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## The Danger of Nonrandom Case Assignment: How the Southern District of New York's "Related Cases" Rule Shaped Stop-and-Frisk Rulings

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# THE DANGER OF NONRANDOM CASE ASSIGNMENT: HOW THE SOUTHERN DISTRICT OF NEW YORK'S "RELATED CASES" RULE SHAPED STOP-AND-FRISK RULINGS

Katherine A. Macfarlane\*

*The Southern District of New York's local rules are clear: "[A]ll active judges . . . shall be assigned substantially an equal share of the categories of cases of the court over a period of time." Yet for the past fourteen years, Southern District Judge Shira Scheindlin has been granted near-exclusive jurisdiction over one category of case: those involving wide-sweeping constitutional challenges to the New York Police Department's (NYPD) stop-and-frisk policies. In 1999, Judge Scheindlin was randomly assigned *Daniels v. City of New York*, the first in a series of high-profile and high-impact stop-and-frisk cases. Since then, she has overseen an uninterrupted stream of equally landmark stop-and-frisk cases, which culminated in an August 12, 2013 order granting a sweeping injunction against the NYPD. The cases were assigned according to the Southern District's "related cases" local rule, which allows judges to "accept" a new case related to an earlier-filed case already on their docket.<sup>1</sup>*

*Unlike past stop-and-frisk scholarship, this Article addresses the procedural rules that have shaped the development of stop-and-frisk law, arguing that case assignment rules should not permit any district judge to exert total control over the evolution of significant Constitutional jurisprudence. The Article begins by challenging the commonly-held assumption that federal cases are assigned to district judges at random. It explains that although random assignment is widely assumed and generally heralded, it is not enforceable. Instead, district courts retain discretion to assign cases as they wish, with little (if any) obligation for transparency. The Article looks specifically to the Southern District of New York's Local Rules, examining the numerous ways in which cases are assigned to specific judges according to the cases' subject matter, through a system hidden from the public and devoid of over-*

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1. The related cases rule was amended by the South District of New York (S.D.N.Y.) on December 23, 2013. This Article makes note of any substantive differences between the rule in place when the stop-and-frisk cases were assigned to Judge Scheindlin and the current version of the rule.

sight. The Article then traces stop-and-frisk litigation from its roots in *Terry v. Ohio* to the complex and protracted stop-and-frisk cases filed in federal courts across the country today. It explains how police have utilized stop-and-frisk practices before and after *Terry*, focusing on the Giuliani-era theory of “hot-spot policing.” The Article turns to the stop-and-frisk litigation previously and currently assigned to Judge Scheindlin and uses it to examine the serious—and substantive—consequences of nonrandom case assignment in an adversary system. Non-random assignment allows an interested judge to inject herself into the litigation as a player with a stake in the outcome. Giving one district judge power over an entire category of Fourth Amendment jurisprudence, for example, elevates her decisions to a quasi-appellate level of significance, violating the principle that a district court opinion is not binding on any court within the same district. This Article proposes amendments to the Southern District’s Local Rules to prohibit manipulation of case assignments, advocates for the publication of assignment decisions, and suggests appropriate motion practice for challenging the assignments. Finally, the Article evaluates the impact Judge Scheindlin’s control over this area of the law may have if appealed to the Supreme Court. Because her decisions take a broad view of a plaintiff’s right to enforce the Fourth Amendment, they may be subject to reversal, consequently narrowing the rights at stake. On December 23, 2013, some but not all of the changes to the Southern District of New York’s local rules suggested by this Article, which was available in draft form on the Social Science Research Network, and cited in an article that appeared in November in the *Wall Street Journal*, were implemented. The changes, and their shortcomings, are described in the Article’s Afterword.

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## INTRODUCTION

On August 12, 2013, in a 198-page order that followed a three-month bench trial, Southern District of New York Judge Scheindlin rendered a verdict on the New York Police Department's (NYPD) stop-and-frisk policies. The controversial practices required NYPD officers to detain individuals suspected of criminal activity and pat them down if the officers believed them to be armed. Opponents argued that the practices were, in actuality, thinly-disguised techniques to target and profile members of racial minorities, who have been subject to far more stops-and-frisks than white residents of New York City. Judge Scheindlin agreed and granted a sweeping injunction against the NYPD, ordering changes to NYPD policies and activities, appointing a monitor to oversee stop-and-frisk practices, requiring a "community-based joint remedial process to be conducted by a court-appointed facilitator," and, most remarkably, requiring the NYPD to place body-worn cameras on its police officers.<sup>2</sup> The verdict received worldwide attention.<sup>3</sup> It was both lauded and scrutinized. When the Second Circuit heard argument on whether the verdict should be stayed, it took the unprecedented action of examining the manner in which the case had been assigned to Judge Scheindlin and *sua sponte* removed her from the case.<sup>4</sup>

But this was not Judge Scheindlin's first stab at a wide-sweeping, high-impact stop-and-frisk decision. Despite the mountain of attention paid to New York City's stop-and-frisk practices and the litigation before Judge Scheindlin, it has gone remarkably unnoticed that the same judge has held court over a stream of similar cases for the past fourteen years. How can this be? After all, the Southern District of New York's local rules are clear: "all active judges, except the chief judge, shall be assigned sub-

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2. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 563 (S.D.N.Y. 2013). Prior to joining the LSU faculty, I worked in the New York City Law Department's Special Federal Litigation Division, which defended the City in *Daniels v. City of New York*, 198 F.R.D. 409 (S.D.N.Y. 2001), *Floyd*, and *Ligon v. City of New York*, 925 F. Supp. 2d 478 (S.D.N.Y. 2013). *Daniels* settled before I joined the Law Department. I did not work on either *Floyd* or *Ligon*.

3. See, e.g., Matt Williams & Ryan Deveraux, *New York's stop-and-frisk policy is unconstitutional, judge rules*, THE GUARDIAN (Aug. 12, 2013, 2:26 PM) <http://www.theguardian.com/world/2013/aug/12/new-york-stop-and-frisk-unconstitutional-judge>.

4. *Floyd v. City of New York*, No. 13-3524 (2d Cir. Oct. 31, 2013); *Ligon v. City of New York*, No. 13-3123 (2d Cir. Oct. 31, 2013), available at [http://www.nytimes.com/interactive/2013/11/01/nyregion/01frisk-ruling.html?\\_r=0](http://www.nytimes.com/interactive/2013/11/01/nyregion/01frisk-ruling.html?_r=0).

stantially an equal share of the categories of cases of the court over a period of time.”<sup>5</sup> Yet time and time again, cases involving wide-sweeping constitutional challenges to the NYPD’s stop-and-frisk policies have been assigned to Judge Scheindlin.<sup>6</sup>

In 1999, she was randomly assigned *Daniels v. City of New York*,<sup>7</sup> the first in a series of high-profile and high-impact stop-and-frisk cases.<sup>8</sup> In the fourteen years that followed *Daniels*’s filing, Judge Scheindlin has overseen an uninterrupted stream of additional and equally landmark stop-and-frisk cases, but not through random case assignment procedures. Instead, cases have been directed to her through the Southern District’s “related cases” rule.<sup>9</sup> The rule allows judges to “accept” later-filed cases if they are related to an earlier-filed case already on their docket.<sup>10</sup> Before it was recently amended, and at all times relevant to the stop-and-frisk cases described in this Article, the rule left the decision to accept or reject the newly-filed case within the “sole discretion” of the judge who received the earlier-filed case.<sup>11</sup>

While such “discretion” may sound innocuous enough, it can create serious structural problems in application. One judge will make the relatedness decision based on an understanding of the facts alleged in the later-filed case, as well as by evaluating its subject matter. This injects the judge into the cases as something other than a neutral arbiter. The procedure allows litigation to be steered to a jurist with an interest in the case’s outcome.

This Article contends that case assignment procedures should not permit any district judge to handpick high-impact litigation. It begins in Part I by examining the commonly-held assumption that federal cases are assigned to district judges at random after they are filed. It surveys the rare documented instances in which nonrandom assignment has been challenged, concluding that though random assignment is heralded, parties have no right to demand it. Instead, district courts retain broad discretion to direct the manner in which cases are assigned to their judges. In this

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5. S.D.N.Y. Rules for the Division of Business Among District Judges, Rule 1 [hereinafter Division of Business Rules], available at <http://www.nysd.uscourts.gov/rules/rules.pdf>.

6. Joseph Goldstein, *A Court Rule Directs Cases Over Friskings To One Judge*, N.Y. TIMES, May 6, 2013, at A16.

7. Civil Docket, *Daniels v. City of New York*, 198 F.R.D. 409 (S.D.N.Y. Mar. 8, 1999) (No. 99-cv-1695-SAS).

8. See *Davis v. City of New York*, No. 1:10-cv-00699 (SAS), 2013 WL 1288176, at \*2 (S.D.N.Y. Mar. 28, 2013); *Ligon v. City of New York*, No. 1:12-cv-02267 (SAS), 2013 WL 628534, at \*1–2 (S.D.N.Y. Feb. 14, 2013); *Floyd v. City of New York*, 283 F.R.D. 153, 159–60 (S.D.N.Y. 2012); *Daniels v. City of New York*, 198 F.R.D. 409, 411 (S.D.N.Y. 2001).

9. See S.D.N.Y. Rules for the Division of Business Among District Judges, Rule 13 (amended Jan. 1, 2014) [hereinafter 2013 Division of Business Rules] (on file with author).

10. See *id.* at 13(c)(ii).

11. *Id.*

context, the Article looks to the Southern District of New York's Local Rules and critiques the numerous ways cases are assigned pursuant to their subject matter, through a system hidden from the parties and devoid of oversight.

In Part II, the Article then traces stop-and-frisk litigation from *Terry v. Ohio* to the politically-charged, complex, and protracted stop-and-frisk litigation fought in federal courts around the country today. It also explains how police have utilized stop-and-frisk practices before and after *Terry*, focusing in particular on the Giuliani-era theory of "hot-spot policing." With these procedural and substantive backgrounds in mind, Part III next turns to Section 1983 stop-and-frisk litigation in the Southern District of New York, and documents how, over the course of fourteen years, landmark stop-and-frisk cases have been repeatedly assigned to the same judge.

Part IV then examines the grave consequences nonrandom case assignment has had and may continue to have in the Southern District's stop-and-frisk litigation. First, it contends that the related cases rule, before it was recently amended, threatened the adversary system, allowing an interested judge to inject herself into the litigation as a player with a stake in the outcome. That stake may have been intellectual—a judge may have preferred one substantive outcome over another and pulled a case onto his or her docket to ensure the preferred outcome. The stake may also have been personal—a judge who presides over important and heavily-reported litigation becomes more visible nationally and even internationally, setting up a promotion to a higher level of the federal court hierarchy, or advancement in private practice or academia. Second, it asserts that the appearance of impartiality created by nonrandom case assignment is reason alone to halt the practice. Third, it argues that giving one district judge power over an entire category of Fourth Amendment jurisprudence elevates that judge's decisions to a quasi-appellate level of significance within the Southern District itself, violating the principle that a district court opinion is not binding.<sup>12</sup> Part V proposes amendments to the Southern District's local rules which would make random case assignment the default procedure and prohibit subject matter-specific manipulation of judges' dockets. It also advocates for making all assignment decisions public and subject to challenge by the parties involved.

Finally, the Article concludes with a warning: delegating Fourth Amendment litigation to one jurist with an arguable interest in the plaintiffs' position may lead to a plaintiff-friendly rule at the District Court level, but it may also increase the chances for appeal and eventual reversal at the United States Supreme Court, thus unintentionally broadening the very police practice the plaintiffs before Judge Scheindlin seek to narrow.

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12. *American Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2540 (2011) ("[F]ederal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.").



On December 23, 2013, some but not all of the changes to the Southern District of New York's local rules suggested by this Article, which was available in draft form on the Social Science Research Network, were implemented. The changes, and their shortcomings, are described in the Article's Afterword. The Afterword also summarizes the procedural twists and turns the stop-and-frisk cases have taken in the last few months, including the Second Circuit's decision to remove Judge Scheindlin from *Floyd* and *Ligon* based on her use of the related cases rule.

# I. RANDOM ASSIGNMENT OF CASES IS VENERATED BUT UNENFORCEABLE AND SUBJECT TO NUMEROUS EXCEPTIONS

## A. *Random Assignment: An Honored Practice Assumed to Be the Norm*

That fourteen years worth of significant stop-and-frisk cases have been assigned to Judge Scheindlin suggests that all federal cases are not assigned at random. Yet the notion that a case filed in a federal district court is assigned at random to a district judge is pervasive. Treatises and legal scholarship assume random assignment.<sup>13</sup> There is even a stock description of how the process occurs: after a case is filed, literal wooden wheels, filled with index cards upon which the names of each district judge is printed, spin around and around, until the court clerk approaches the wheel and randomly draws a card, thus selecting the judge who will preside over the just-filed case.<sup>14</sup>

Not only is random assignment assumed to be the status quo, it is also a popular, venerated practice. Southern District of New York Judge Cote describes it as "a beautiful thing" that makes her docket "rich and varied."<sup>15</sup> The Judicial Conference, a committee comprised of the chief

13. See, e.g., 2 N.Y. PRAC., COM. LITIG. IN N.Y. STATE COURTS § 11:5 (3d ed. 2012) ("[New York] federal and state courts . . . use an 'individual assignment system' in which a judge is randomly assigned 'off the wheel' upon the filing . . . of a complaint, or, in state court, of a request for judicial intervention."); Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 812 (2012) ("Both circuit courts and district courts rely on random assignment to match cases with judges.") (citation omitted); Ahmed E. Taha, *Judge Shopping: Testing Whether Judges' Political Orientations Affect Case Filings*, 78 U. CIN. L. REV. 1007, 1010 (2010) ("Judicial assignment is conducted randomly in federal district courts . . .") (citation omitted); Richard Marcus, *Still Confronting the Consolidation Conundrum*, 88 NOTRE DAME L. REV. 557, 587 (2012) ("[T]he federal courts rely on a random assignment system . . .").

14. Arnold H. Lubasch, *Judge-Shopping in Federal Court: Lawyers' Quest for Leniency*, N.Y. TIMES, Mar. 4, 1987, at B1, available at <http://www.nytimes.com/1987/03/04/nyregion/judge-shopping-in-federal-court-lawyers-quest-for-leniency.html>; Goldstein, *supra* note 6 ("After an attempted police stop in 1999 led to the shooting of an unarmed Guinean immigrant named Amadou Diallo, a civil-rights group sued the New York Police Department . . . [f]rom one of the wooden wheels used to assign cases in Federal District Court in Manhattan, a judge's name was drawn: Shira A. Scheindlin.").

15. Denise Cote, *Making Experts Count*, 58 J. COPYRIGHT SOC'Y U.S.A. 223, 223 (2011).



judge of each circuit and a district judge from each circuit,<sup>16</sup> has a “long-standing position” favoring the random assignment of federal cases.<sup>17</sup>

Random assignment is widely assumed to be standard practice because it is sensible. In theory, it serves several important goals. First—and most practically—it divvies up a district’s docket, assigning an equal number of cases to each judge.<sup>18</sup> Second, it prevents any party from favorably shopping for one judge over another.<sup>19</sup> Third, it prohibits any judge from lobbying for a particular case<sup>20</sup>—a good idea, as a judge who lobbies for a particular case may have an interest in a particular outcome.<sup>21</sup> Fourth, random assignment is also favored by judges who want to remain generalists, rather than be forced to specialize in, for example, patent litigation. A diverse docket permits the cross-fertilization of ideas: a judge may “look[ ] at cases from one field and realize[ ] how an earlier decision in which [she] participated from a different field may suggest a creative answer to the problem.”<sup>22</sup> A judge who hears a class action sexual harassment case may later apply her class action knowledge to a securities matter. If she always chose sexual harassment cases over securities matters, the securities cases would not benefit from her procedural insight.

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16. *Judicial Conference of the United States*, UNITED STATES COURTS, <http://www.uscourts.gov/FederalCourts/JudicialConference.aspx> (last visited Apr. 2, 2014) (“The Conference of Senior Circuit Judges [renamed in 1948 as ‘the Judicial Conference of the United States’] was created by Congress in 1922, to serve as the principal policy making body concerned with the administration of the U.S. Courts . . . [T]he fundamental purpose of the Judicial Conference today is to make policy with regard to the administration of the U.S. courts.”); *Membership*, UNITED STATES COURTS, <http://www.uscourts.gov/FederalCourts/JudicialConference/Membership.aspx> (last visited Apr. 2, 2014) (“The Chief Justice of the United States is the presiding officer of the Judicial Conference. Membership is comprised of the chief judge of each judicial circuit, the Chief Judge of the Court of International Trade, and a district judge from each regional judicial circuit.”).

17. *The Third Branch*, UNITED STATES COURTS, [http://www.uscourts.gov/news/TheThirdBranch/07-04-01/Legislation\\_Update\\_Bills\\_Focus\\_on\\_Security\\_Cameras\\_and\\_Patents.aspx](http://www.uscourts.gov/news/TheThirdBranch/07-04-01/Legislation_Update_Bills_Focus_on_Security_Cameras_and_Patents.aspx) (Apr. 2007) (“[T]he Conference has a long-standing position favoring the random assignment of federal cases filed.”).

18. *United States v. Mavroules*, 798 F. Supp. 61, 61 (D. Mass. 1992) (“[B]ind, random draw selection process . . . prevents judge shopping by any party, thereby enhancing public confidence in the assignment process.”); Brooke Terpening, *Practice Makes Perfect? An Empirical Analysis of H.R. 5418*, 4 FIU L. REV. 287, 315 (2008) (“The system is designed to have an equal number of cases assigned to each judge over a period of time.”).

19. Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 292 (1996); Taha, *supra* note 13, at 1010 (declaring that as a result of random assignment, cases that result in outcomes that one party considers politically undesirable are the result of nothing more than bad luck).

20. See Theodor Meron, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 AM. J. INT’L L. 359, 364 (2005).

21. See, e.g., Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 630 (1994).

22. Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1767 (1997).

Legal and lay respect for random assignment is further confirmed by the rare instances when the practice was not honored—indeed, deviation from random assignment in high-profile cases can result in public outrage and congressional scrutiny. For example, in 1999, Judge Holloway Johnson, Chief Judge of the United States District Court for the District of Columbia, chose to assign criminal cases against so-called “presidential friends” Webster Hubbell and Charlie Trie to judges appointed by then-President Clinton, who, presumably, would be more sympathetic to these defendants, as opposed to having their cases randomly assigned.<sup>23</sup> Though local court rules permitted Judge Johnson to assign protracted cases like the Hubbell and Trie matters to specific judges she believed had enough bandwidth to handle them, Judge Johnson was aggressively criticized for her supposed partial administration of justice.<sup>24</sup> Orrin Hatch, then acting Senate Judiciary Chairman, asked Chief Justice Rehnquist to consider investigating why cases involving President Clinton’s “friends” were assigned to Clinton-appointed judges.<sup>25</sup> Hatch also expressed concern that the incident would affect “the public’s confidence in the impartial administration of justice by the federal courts.”<sup>26</sup>

The District of Columbia Circuit’s Judicial Council asked a committee of trial and appellate judges to investigate Judge Johnson’s actions; the committee hired a Republican former U.S. Attorney to conduct interviews and issue a report.<sup>27</sup> His report concluded that there was no evidence of a partisan plot.<sup>28</sup> Nevertheless, following the investigation, the District of Columbia rescinded the rule that permitted nonrandom case assignment in protracted litigation and ordered that random assignment be followed.<sup>29</sup> Though no bias or wrongdoing was found, the mere appearance of impropriety and the potential for bias was enough to discard the rule.

Even after the rule change, the scrutiny of Judge Johnson’s actions persisted. Judicial Watch, a conservative watchdog group particularly interested in the Clinton Administration, brought a complaint of judicial misconduct against Judge Johnson pursuant to the Judicial Council Reform and Judicial Conduct and Disability Act of 1980,<sup>30</sup> a statute designed to

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23. Pete Yost, *Hubbell and Trie Cases Weren’t Randomly Assigned*, PHILA. INQUIR., Aug. 1, 1999, at A02. Hubbell was accused of tax evasion, whereas Trie was accused of violating campaign finance law. Bill Miller, *Judge Is Cleared of Impropriety; No Political Motive Found in Assignment of Sensitive Cases*, WASH. POST, Feb. 27, 2001, at A21.

24. Miller, *supra* note 23.

25. Janelle Carter, *Hatch Asks for Probe of 2 Case Assignments*, NEW ORLEANS TIMES-PICAYUNE, Aug. 6, 1999, at A4.

26. *Id.*

27. Miller, *supra* note 23.

28. *Id.*

29. *Id.*

30. 28 U.S.C. § 372(c)(1) (1994) (repealed 2002).

ensure that federal judges “will not ‘engage[ ] in conduct prejudicial to the effective and expeditious administration of the business of the courts.’”<sup>31</sup> The complaint alleged that Judge Johnson had departed from random assignment in criminal cases brought against “friends of the president,” steering them to judges appointed by Clinton so as to “tilt the cases in the administration’s favor.”<sup>32</sup>

The Chief Judge of the District of Columbia Circuit, to whom the complaint was assigned, swiftly dismissed the allegation, explaining that local rules permitted nonrandom assignment of protracted cases in order to efficiently dispose of the court’s business.<sup>33</sup> However, the Chief Judge did note that the local rule allowing nonrandom assignment, and “the absence of ‘objective standards to govern the rule’s use,’” made “‘both actual and perceived abuses’ possible.”<sup>34</sup> If random assignment had been the default procedure at the moment both the *Trie* and *Hubbell* cases were assigned, the protracted inquiry into Judge Johnson’s actions, and any related delay and cost, might have been avoided. Placing case assignment into any judge’s hands—even the chief judge’s—will always raise a question of partiality, even if partiality is not ultimately proven.

#### B. *There Is No Right to Random Assignment*

Even though random assignment of newly-filed federal cases purportedly inspires public confidence in the judiciary and deviation inspires public outrage, random assignment is not an enforceable right, even in the criminal context.<sup>35</sup> Case assignment rules are dismissively referred to as “housekeeping” measures that do not vest litigants with any rights.<sup>36</sup> The only relevant case assignment statute empowers district courts to write their own case assignment rules, which are categorized as “the business of a court.”<sup>37</sup> The district court’s chief judge is responsible for ensuring that such rules are observed,<sup>38</sup> but because the district court is tasked with both making and applying its own rules, parties have no mechanism to require the district court to assign cases randomly.

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31. *In re Charge of Judicial Misconduct or Disability*, 196 F.3d 1285, 1287 (D.C. Cir. 1999).

32. Stephen L. Wasby, *Legal Notes*, 21 JUST. SYS. J. 323, 331 (2000).

33. *Id.*

34. *Id.* at 331–32.

35. *Bd. of Sch. Dirs. of Milwaukee v. Wis.*, 102 F.R.D. 596, 598 (D. Wis. 1984) (“The assignment of cases does not give or deny any litigant any due process rights.”); *United States v. Keane*, 375 F. Supp. 1201, 1204 (N.D. Ill. 1974) (noting that criminal defendants have no due process right to the manner in which their cases are assigned).

36. J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1096 (2000).

37. 28 U.S.C. § 137 (1994).

38. *Id.*

There is, however, a limited and illustrative exception: in the rare event that district judges cannot agree upon the adoption of case-assignment rules, the governing circuit court intervenes and implements its own case assignment rules.<sup>39</sup> Under these circumstances, the district court is subject to the supervening circuit court's rules, so that a litigant will have a mechanism to demand random case assignment only if those rules require random assignment. This was the case in *Utah-Idaho Sugar Company v. Ritter*, in which a plaintiff succeeded in challenging the chief judge of the District of Utah's decision to assign the plaintiff's case to himself, instead of at random.<sup>40</sup>

In 1972, when *Utah-Idaho Sugar* reached the Tenth Circuit, the Utah District's "business of the court" had been supervised by the Circuit for nearly fifteen years; during that stretch of time, the judges sitting within the District of Utah could not agree upon case assignment rules.<sup>41</sup> The rules put in place by the Circuit "requir[ed] an equal and random division of civil cases" which "balanced and apportioned the criminal, bankruptcy, immigration, and naturalization cases."<sup>42</sup> In 1971, the chief judge of the District of Utah empowered himself to overrule the Circuit's assignment procedures, giving himself the power to distribute cases as he saw fit.<sup>43</sup> In so doing, he kept certain cases and assigned others.<sup>44</sup> The plaintiff's case was one he kept.

Although the judge's methods did not comply with the Circuit's rule of random assignment, this alone did not invalidate his actions. Because the District of Utah had only two judges, the chief judge and a non-chief district judge, and these judges did not agree on the chief judge's procedures, the Circuit's rules controlled.<sup>45</sup> The Circuit's rules happened, by chance, to provide for random-case assignment. If the two District of Utah judges had agreed that the chief judge had discretion to hold on to certain cases and assign out others, that rule would have controlled.

As *Utah-Idaho Sugar* demonstrates, any perceived right to random assignment is illusory. District courts have broad discretion to assign cases as they see fit, and there is no mechanism for parties to challenge those decisions. Moreover, as described below, not only is any "right" in the Southern District of New York illusory, the many exceptions to random assignment permit judges to avoid entire categories of cases they do not wish to hear and to actively seek out the ones they want.

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39. *Id.*

40. 461 F.2d 1100, 1101-02 (10th Cir. 1972).

41. *Id.*

42. *Id.* at 1102.

43. *Id.*

44. *Id.* at 1104.

45. *Id.* at 1103. See generally 28 U.S.C. § 137 (governing the "[d]ivision of business among district judges" and requiring the judicial council of a circuit to make "necessary orders" when district judges cannot agree on rules "for that purpose").

C. *The Southern District of New York's Case Assignment Rules Permit Judges to Choose Cases Based on the Cases' Subject Matter*

The Southern District of New York's Rules for the Division of Business Among District Judges—which govern how cases are assigned after they are filed—appear to mandate random assignment, stating that “[e]ach civil and criminal action and proceeding, except as otherwise provided, shall be assigned *by lot* to one judge for all purposes.”<sup>46</sup> By lot assignment implies that each judge will receive an equal share of cases. It automatically considers all judges who might be eligible to receive the case and then randomly assigns it. The rules further provide that “all active judges, except the chief judge, shall be assigned substantially an equal share of the categories of cases of the court over a period of time.”<sup>47</sup> This is the default rule in district courts across the country, from the Eastern District of New York<sup>48</sup> to the Central District of California.<sup>49</sup> Yet a close examination of the Southern District of New York's rules reveals that random assignment, though presumed to be the status quo, is often the exception rather than the rule.

There are valid reasons to have certain cases assigned deliberately. As the original related cases rule highlighted, assigning truly related cases to the same judge might render litigation more efficient and economical for parties and judges alike. As one district judge has explained,

The reason we have relatedness rules in the district courts is to avoid treating similar cases dissimilarly and because it wastes judicial resources by duplicating effort when two judges deal with similar issues. The failure to enforce relatedness rules can cause a huge problem for the lawyers, the trial judge and the appeals court.<sup>50</sup>

Yet the related cases rule was not really a rule about relatedness—even absent any factor proving relatedness, a district judge could still deem a case “related” in order to pull it on to his or her docket. What this amounts to, and what this Article is concerned with, is using rules which are nominally about efficiency and convenience to disguise subject matter-based case selection. The Southern District of New York rules described below present just this kind of risk.

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46. Division of Business Rules, *supra* note 5, Rule 1 (emphasis added).

47. *Id.*

48. Division of Business Rules, *supra* note 5, Rule 50.2(b).

49. C.D. CAL. GEN. ORDER NO. 08-05 (2008); *see also* OR. LR 16-1(a); N.D. ILL. LR 40.1(a); N.M. R. CIV. R. 73.1(a),(c); E.D. PA. CIV. RULE 40.1(b); ALASKA R. CIV. 40.1(a).

50. Richard G. Kopf, *A cheap shot*, HERCULES AND THE UMPIRE (Nov. 3, 2013), <http://herculesandtheumpire.com/2013/11/03/a-cheap-shot/>.

1. Case Assignment in the Southern District Is Overseen by a Committee and Makes No Use of a “Wheel”

Though each Southern District case is purportedly assigned “by lot,” the “by lot” system is administered by an assignment committee, consisting of the district’s chief judge and two other district judges.<sup>51</sup> The assignment committee rules upon “all issues relating to assignments.”<sup>52</sup> The assignment committee’s membership and decision-making processes are not made public. When a case is assigned to a district judge by the assignment committee, even the district judge to whom the case is assigned remains in the dark as to why he or she received the case.<sup>53</sup>

The assignment committee also assigns cases by nonrandom procedures in circumstances not contemplated by the local rules. For example, the rules are silent as to how assignment of cases transferred from other districts into the Southern District should be handled. In 2010, Southern District of New York Chief Judge Preska selected the judge to whom fifteen shareholder actions against Bank of America should be reassigned after Southern District Judge Chin, who was presiding over the cases, was appointed to the Second Circuit.<sup>54</sup> Bank of America was before Southern District Judge Rakoff on another matter (brought by the SEC) and wrote Judge Chin, on the record, asking that the cases on his docket be reassigned by lot rather than to Judge Rakoff.<sup>55</sup>

Following submission of that letter, Judge Preska assigned the cases to another judge in the District, Judge Castel. Preska insisted that Bank of America’s letter to Judge Chin had no influence over her decision, but rather that the cases were assigned to the judge of her choosing because they were originally transferred into the Southern District from other districts.<sup>56</sup> Whether individual judges oversee case assignment via an assignment committee or the actions of the Chief Judge circumvent random assignment in cases selected for this kind of treatment, case assignment in the Southern District could not be more different than the sort of assignment that would follow the spinning of a wheel. Case assignment in the Southern District of New York is a deliberate process.

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51. Division of Business Rules, *supra* note 5, Rules 1, 2.

52. *Id.* at Rule 2.

53. See, e.g., *In re Lion Capital Grp.*, 63 B.R. 199, 208 n.12 (Bankr. S.D.N.Y. 1985) (noting that “[t]he actual assignment of this matter was done ‘pursuant to the instructions of the Assignment Committee,’” and that although “the assignment committee rules upon matters relating to assignments in accordance with these rules[,] [t]he considerations that led to this assignment are not known”).

54. J. Robert Brown, Jr., *Non-Random Assignment of Federal Cases and Bank of America*, RACE TO THE BOTTOM (May 20, 2010, 6:00 AM), <http://www.theracetothetbottom.org/miscellaneous/non-random-assignment-of-federal-cases-and-bank-of-america.html>.

55. *Id.*

56. *Id.*

## 2. Certain Cases Are Expressly Exempt From Random Assignment

Certain categories of civil actions and proceedings are exempt from random assignment. Applications for leave to proceed *in forma pauperis* (IFP) are expressly exempt from assignment by lot,<sup>57</sup> though no corresponding rule addresses the manner in which the applications are actually assigned.<sup>58</sup> Similarly, the assignment committee may certify a case as one requiring “extraordinary priority or a prompt trial or other disposition” and allow the initially-assigned judge to decline the case.<sup>59</sup> These categories of cases are removed from the “by lot” system and systematically and deliberately sent to a particular courtroom, further undermining the notion that assignment in the Southern District is a random process.

## 3. Senior Judges and Visiting Judges Can Avoid Entire Categories of Cases

Certain judges are permitted to select the number and category of cases they are willing to take. Perhaps the most important of these are the senior judges, who handle 15 percent of all cases in the federal courts.<sup>60</sup> Senior judges may request that they only receive new cases in limited subject matters and may directly select the subject matter of the cases they are willing to accept on transfer from other districts.<sup>61</sup> Senior judges also have considerable discretion over their existing dockets and may furnish the assignment committee with a list of cases they want transferred out of their respective courtrooms.<sup>62</sup>

Another significant category of exceptions to the random assignment rule is visiting judges. A visiting judge assigned to the Southern District must advise the assignment committee of the number and categories of pending cases he or she wishes to accept.<sup>63</sup> This is a somewhat puzzling rule, since, by statute, visiting judges may only be assigned to service in a district court in another circuit “upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.”<sup>64</sup> One might expect that a district’s certified necessity would arise

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57. Division of Business Rules, *supra* note 5, Rule 4(b).

58. One such application, made in *Liu v. Mount Sinai School of Medicine*, was granted by Chief Judge Preska, who was not presiding over the case in which IFP status was sought. 09-cv-9633-RJS, Dock. No. 1 (Nov. 20, 2009).

59. Division of Business Rules, *supra* note 5, Rule 7.

60. UNITED STATES COURTS, FREQUENTLY ASKED QUESTIONS, FEDERAL JUDGES, *available at* <http://www.uscourts.gov/Common/FAQS.aspx> (last visited Apr. 2, 2014).

61. Division of Business Rules, *supra* note 5, Rule 11.

62. *Id.* at Rule 15.

63. *Id.* at Rule 12.

64. 28 U.S.C. § 292(d). In at least one instance, a chief circuit judge has refused to certify that a “necessity” required a visit from an out-of-circuit judge where “[n]either [the chief circuit judge] nor our Circuit Executive [were] contacted by the Chief Judges of the [districts within our circuit] representing that there’s a need for an out-of-circuit judge to handle these



with respect to specific cases and that the visiting judge would be expected to help relieve that burden, rather than dictate what types and number of cases he or she is willing to hear.

#### 4. Patent Cases Can Be Rejected Following Initial Random Assignment and Then Assigned to Specific Judges Willing to Preside Over Patent Cases

Perhaps the best-known exception to random assignment is patent cases. A Patent Pilot Program inaugurated in November 2011 allows certain judges in the Southern District (and thirteen other “pilot” courts) who are randomly assigned patent cases to, thirty days after filing, decline the case and have it assigned by lot to one of ten district judges participating in the program.<sup>65</sup> Cases are then re-assigned to judges who requested to be designated as pilot patent judges.<sup>66</sup>

Patent cases are often treated differently than other civil matters based on the assumption that they are more difficult or time-consuming. However, the same could be said of habeas corpus petitions, or immigration appeals, yet those cases are not subject to any special kind of assignment procedure through which self-selected experts preside over them. The special treatment patent litigation has received may be a result of patent litigators’ political capital, as opposed to any substantive challenge unique to patent litigation.

#### 5. Judges Can Handpick Cases for Their Docket After the Cases Are Filed

The most permissive rules governing nonrandom assignment allow “any judge, upon written advice to the assignment committee” to transfer any case, or any part of a case, “to any consenting judge” unless the transfer is due to disqualification or the fact that a judge “has presided over a mistrial or former trial of the same case,” in which case assignment by lot

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cases upon remand to their respective districts.” *In re Motor Fuel Temperature Sales Practices Litig.*, 711 F.3d 1050, 1052 (9th Cir. 2013); *see also id.* at 1053 (“[O]ur first recourse is to try to fill the need by bringing in a visiting judge from another court within the circuit.”). This author suspects, based on anecdotal experience, that not every such visit is inspired by necessity—some districts are simply more pleasant than others in mid-winter.

65. OFFICE OF THE DISTRICT EXECUTIVE, TEN SDNY JUDGES TO PARTICIPATE IN PATENT PILOT PROGRAM STARTING NOVEMBER 26 (Nov. 3, 2011), *available at* [http://www.nysd.uscourts.gov/file/news/patent\\_pilot\\_program\\_press\\_release](http://www.nysd.uscourts.gov/file/news/patent_pilot_program_press_release). “The Pilot Program will be implemented over a ten-year period in fourteen pilot courts across the country . . . . In theory, as patent cases funnel to the pilot judges, these judges will hear more patent cases, which will increase their familiarity with patent law, potentially resulting in higher quality opinions more likely to ‘withstand appellate scrutiny.’” Etan S. Chatlynnne, *On Measuring the Expertise of Patent-Pilot Judges: Encouraging Enhancement of Claim-Construction Uniformity*, 12 J. MARSHALL REV. INTELL. PROP. L. 309, 313 (2013).

66. Chatlynnne, *supra* note 65, at 312.

controls.<sup>67</sup> This rule permits the consenting judge to agree to take a specific case onto his docket. Indeed, it permits the consenting judge to seek out such cases by asking a judge whether he is willing to give away the case in question.

Before Rule 13 was amended, the rules regarding transfer of related cases also allowed a judge to preselect a case. An attorney filing a case that may be related to a previously-filed case must designate that case as related on a form that is served with the complaint.<sup>68</sup> A case that is so designated was then “forwarded to the judge before whom the earlier-filed case is then pending.”<sup>69</sup> In determining relatedness, a judge could consider whether:

- (1) A substantial saving of judicial resources would result; or
- (2) The just efficient and economical conduct of the litigations would be advanced; or
- (3) The convenience of the parties or witnesses would be served.<sup>70</sup>

A judge could also take into account “a congruence of parties or witnesses or the likelihood of a consolidated or joint trial or joint pre-trial discovery.”<sup>71</sup>

Despite the criteria governing relatedness, the judge to whom the potentially related case was forwarded “ha[d] the sole discretion to accept or reject the case.”<sup>72</sup> Indeed, Rule 13, the “Transfer of Related Cases” rule, cross-referenced Rule 14, which permits transfer of cases by consent and stated that that “[n]othing in [Rule 13] limits the use of Rule 14 for reassignment of all or part of any case from the docket of one judge to that of another by agreement of the respective judges.”<sup>73</sup> Combined, these two rules permitted judges to transfer cases to each other, whether the case being transferred was related to one already existing on the transferee judge’s docket, or not.<sup>74</sup>

The remainder of this Article addresses the practical application and substantive consequences of the last of these categories—the “related-

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67. Division of Business Rules, *supra* note 5, Rule 14.

68. 2013 Division of Business Rules, *supra* note 9, Rule 13(c)(i).

69. *Id.* at Rule 13(c)(ii).

70. *Id.* at Rule 13(a)(i)–(iii).

71. *Id.* at Rule 13(a)(iii).

72. *Id.* at Rule 13(c)(ii).

73. *Id.* at Rule 13(f).

74. Similar rules apply to motions for collateral relief under 28 U.S.C. § 2254 and motions for the return of property seized in a criminal case. 2013 Division of Business Rules, *supra* note 9, Rule 9(a). Though these categories of motions also raise the case assignment manipulation issues addressed in this Article, they are themselves beyond its scope.

cases” rule—on the so-called “stop-and-frisk” litigation in the Southern District of New York.

## II. THE EVOLUTION OF STOP-AND-FRISK LITIGATION: FROM *TERRY* V. *OHIO* TO MODERN CHALLENGES TO NEW YORK CITY POLICING

### A. *Terry v. Ohio Holds that Stop-and-Frisk Policing Practices Are Constitutional Even in the Absence of Probable Cause*

Over thirty years before *Daniels v. City of New York* was filed in the Southern District of New York, the Supreme Court addressed whether the Fourth Amendment requires that police officers possess probable cause to stop, question, and frisk people they encounter on the street.<sup>75</sup> *Terry* is often viewed as having legitimized and opened the door to more intrusive police practices—though, of course, *Terry* addressed police practices that were already in force. In the decades preceding *Terry v. Ohio*, police officers across the country routinely stopped, questioned, and frisked individuals without probable cause or arrest warrants.<sup>76</sup> The practice was commonplace before *Terry* was brought before the Supreme Court, and *Terry* is better understood as having legitimized the status quo.<sup>77</sup>

In *Terry*, the Court assessed the validity of the observations reportedly made by Detective Martin McFadden as he patrolled the streets of downtown Cleveland. McFadden noticed Richard Chilton and John Terry behaving “suspiciously” and believed that they were casing out a business to later rob it; these observations led him to stop and search the two men. McFadden found a gun on both and arrested them.<sup>78</sup> In a pretrial motion, Terry and Chilton argued that the frisk performed by McFadden was an arrest without probable cause, and, therefore, the evidence recovered

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75. *Terry v. Ohio*, 392 U.S. 1 (1968).

76. John Q. Barrett, *Terry v. Ohio*, in *CRIMINAL PROCEDURE STORIES* 299 (Carol S. Steiker ed., 2006).

77. *Id.* at 300. In her seminal book on race and the criminal justice system, Professor Michelle Alexander argues that “[o]nce upon a time, [before *Terry*,] it was generally understood that police could not stop and search someone without a warrant without probable cause.” Michelle Alexander, *THE NEW JIM CROW* 63 (2010). After *Terry*, she contends, “stops, interrogations, and searches of ordinary people driving down the street, walking home from the bus stop, or riding the train, have become commonplace—at least for people of color.” *Id.* at 63–64. However, the notion that *Terry* inaugurated, rather than legitimized, an era of unconstitutional police stops, is belied by Alexander’s own detailed account of the history of racist police tactics targeting minorities pre-*Terry*, as well as her account of the mobilization of “white opposition” to the Civil Rights movement. *Id.* at 40. Though there is no evidence this author is aware of suggesting that *Terry* improved the plight of people of color confronting discriminatory police practices, it is naive to suggest that probable cause was successfully combatting such practices before *Terry*.

78. Barrett, *supra* note 76, at 297–98.

should be suppressed.<sup>79</sup> The motion was denied, and both were convicted.<sup>80</sup>

The *Terry* Court acknowledged that it faced “serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances.”<sup>81</sup> It also noted that it was scrutinizing a “sensitive area” of police conduct and carefully weighed the dueling interests: the “dangerous situations on city streets” versus the “intrusion[s] upon protected personal security.”<sup>82</sup> The Court foreshadowed the nature of future litigation, acknowledging the argument that stop-and-frisk tactics “exacerbate police-community tensions in the crowded centers of our Nation’s cities.”<sup>83</sup> In the end, the balance tipped in favor of perceived policing needs. Following the ruling in *Terry*, an individual suspected of criminal activity may be briefly detained based on “reasonable suspicion,” that is, less than probable cause.<sup>84</sup>

B. *The Aftermath of Terry’s Conspicuous Silence Regarding Race-Based Motives for Police Stops*

*Terry* and Chilton were African American and Detective McFadden was White. These facts were explicit during the *Terry* oral argument, but absent from the Court’s opinion,<sup>85</sup> which is conspicuously silent on the question of whether McFadden had race-based reasons for his suspicions.<sup>86</sup> *Terry* did pause to acknowledge that “certain elements of the police community” had engaged in “[t]he wholesale harassment” of minority groups.<sup>87</sup> Still, according to the Court, the harassment “[would] not be stopped by the exclusion of any evidence from any criminal trial.”<sup>88</sup>

*Terry*’s critics argue that requiring probable cause to stop and frisk might have halted the police practice of using race-specific reasons to choose whom to stop and frisk.<sup>89</sup> Indeed, *Terry*’s silence as to race-based suspicion arguably opened the door to future Fourth Amendment jurisprudence *permitting* the consideration of race in *Terry* stops, as well as in

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79. *Id.* at 300.

80. *Terry*, 392 U.S. at 8.

81. *Id.* at 4.

82. *Id.* at 9–12.

83. *Id.* at 12.

84. *Id.* at 30–31.

85. Barrett, *supra* note 76, at 302.

86. McFadden testified at the suppression hearing that upon first spotting the men, he “didn’t like them”; however, at the Supreme Court oral argument, during an exchange with Justice Marshall, a race-neutral explanation was provided for McFadden’s suspicions, and the issue was dropped. *Id.*

87. *Terry*, 392 U.S. at 14.

88. *Id.* at 14–15.

89. See Alexander, *supra* note 77, at 133.

more intrusive seizures.<sup>90</sup> There remains no Fourth Amendment exclusion remedy for searches and seizures based solely on race.<sup>91</sup> Moreover, the police's perceived authority to rely on "race-dependent criteria" has only served to increase feelings of "racial grievance" against law enforcement.<sup>92</sup>

C. *Policing Post-Terry: New York City's Targeting of Crime "Hot Spots" and the Perception That Stop-and-Frisk Is Racial Profiling*

According to New York City Police Commissioner William Bratton, "[s]top, question and frisk" is a practice that has been around "forever."<sup>93</sup> It is "a basic tool" and is considered "the most fundamental practice in American policing."<sup>94</sup>

Bratton served as NYPD commissioner from 1994 through 1996, reporting to New York Mayor Rudy Giuliani. Under Bratton, the NYPD "began to make extensive use of data to identify crime-prone areas and focus resources on them."<sup>95</sup> Bratton led the development of CompStat, a computerized crime-mapping system.<sup>96</sup> According to its fans, "CompStat revolutionized policing, enabling officers to focus their efforts in problem

90. Post-*Terry*, the Court has allowed a border patrol officer's perception (incorrect or otherwise) that a car is occupied by individuals of "Mexican ancestry" to constitute a relevant factor in establishing reasonable suspicion to stop individuals near the Mexican border. See Carol S. Steiker, *Terry Unbound*, 82 Miss. L.J. 329, 350 (discussing *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)). The car in *Brignoni-Ponce* was stopped sixty-five miles north of the Mexican border. Bernard E. Harcourt, *United States v. Brignoni-Ponce and United States v. Martinez-Fuerte: The Road to Racial Profiling*, in *CRIMINAL PROCEDURE STORIES* 315, 325–26 (Carol S. Steiker ed., 2006). The Court has also rejected consideration of whether, even in the presence of probable cause, "police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants." *Whren v. United States*, 517 U.S. 806, 810 (1996). In *Whren*, the Court resoundingly rejected any examination of "the actual motivations of the individual officers involved." *Id.* at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). *Whren* "quickly emerged as the leading traffic stop case," becoming "the boilerplate citation for the proposition that subjective motives of the police in making a stop are irrelevant in evaluating its [Fourth Amendment] constitutionality." Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1066 (2010).

91. See Steiker, *supra* note 90, at 357; Alexander, *supra* note 77, at 133 ("So long as officers refrain from uttering racial epithets," or admitting that an individual was stopped *only* on account of his race, "courts generally turn a blind eye to patterns of discrimination by the police.").

92. Randall Kennedy, *RACE, CRIME, AND THE LAW* 151 (1997). Professor Kennedy cites Henry Louis Gates, Jr.'s observations that African American men "swap their experiences of police encounters like war stories." *Id.*

93. Jeffrey Toobin, *A Judge Takes On Stop-and-Frisk*, *THE NEW YORKER*, May 27, 2013, at 37.

94. *Id.* ("If the police are not doing it, they are probably not doing their job.").

95. *Id.*

96. William J. Bratton: *Chief of Police*, *THE LOS ANGELES POLICE DEPARTMENT*, [http://www.lapdonline.org/lapd\\_command\\_staff/comm\\_bio\\_view/7574](http://www.lapdonline.org/lapd_command_staff/comm_bio_view/7574) (last visited Aug. 11, 2013).

areas, armed with real-time information, accurate intelligence, rapid deployment of resources, individual accountability, and relentless follow-up.”<sup>97</sup>

Bratton’s “hot-spot policing” targeted low-level crimes, such as non-violent property offenses, which were “more prevalent in urban neighborhoods with elevated rates of poverty and social fragmentation.”<sup>98</sup> This practice also identified and targeted areas inhabited overwhelmingly by people of color, and, as one critic has suggested, “serve[d] to justify indiscriminate policing of th[e] targeted population.”<sup>99</sup> Because minority neighborhoods were disproportionately targeted under hot-spot policing, also termed “order-maintenance policing,” such policies have become synonymous with “racial policing” or “racial profiling.”<sup>100</sup>

Yet pursuant to *Terry*, a stop-and-frisk is not *per se* unconstitutional. Still, New York City’s own comptroller has referred to the NYPD’s use of the practice as “the biggest form of systemic racial profiling we have anywhere in the United States of America.”<sup>101</sup> The practice of “stopping-and-frisking” is frequently deemed “constitutionally offensive.”<sup>102</sup>

According to former NYPD Commissioner Ray Kelly, stop-and-frisk is a “critical—and constitutional” part of the transformation of New York City over the past two decades, during which “the annual number of murders has fallen more than 80%.”<sup>103</sup> In implementing stop-and-frisk, the NYPD places its officers “right in the middle of where the problems are,” which Kelly describes as “mostly minority areas.”<sup>104</sup> Kelly fears that eliminating stop-and-frisk would embolden criminals, who would no longer fear being stopped and would also start carrying and using guns more frequently.<sup>105</sup> However noble its intended purposes were, the NYPD’s stop-and-frisk practices have resulted in stops-and-frisks that disproportionately impact communities of color. Though such practices could still be justified as an unintended consequence of hot-stop policing, at a minimum, they increased tension between the NYPD and the re-

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Until he was recently nominated to be Mayor de Blasio’s NYPD Commissioner, Bratton served as Chief of Police in Los Angeles.

97. *Id.*

98. Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 *FORDHAM URB. L.J.* 457, 461–62 (2000).

99. M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding Zero-Tolerance Policing as a Form of Collective Punishment and Human Rights Violation*, 3 *DREXEL L. REV.* 373, 387 (2011).

100. Fagan & Davies, *supra* note 98, at 462.

101. Editorial, *Public Safety and the Mayor’s Race*, *N.Y. TIMES*, Apr. 26, 2013, at A30.

102. *Id.*

103. James Freeman, *The Political War on the NYPD*, *WALL ST. J.*, Apr. 5, 2013, <http://online.wsj.com/article/SB10001424127887323501004578388311774675612.html>.

104. *Id.*

105. *Id.*

sidents of New York City and certainly laid the groundwork for decades of litigation challenging the practices' constitutionality.

### III. HOW LANDMARK SECTION 1983 STOP-AND-FRISK LITIGATION FOUND ITS WAY TO JUDGE SCHEINDLIN AND NEVER LEFT

#### A. *Judge Scheindlin Is Randomly Assigned the Landmark Daniels v. City of New York Class Action*

In 1999, Judge Scheindlin was randomly assigned *Daniels v. City of New York*, a case filed by the non-profit Center for Constitutional Rights.<sup>106</sup> The civil suit, brought pursuant to 42 U.S.C. § 1983 (Section 1983),<sup>107</sup> alleged that the NYPD's stop-and-frisk practices violated the Fourth Amendment<sup>108</sup> and also sought to disband the NYPD's Street Crime Unit (SCU).<sup>109</sup> The *Daniels* complaint alleged that "in high crime areas, SCU officers have been repeatedly conducting stops and frisks of individuals without the reasonable articulable suspicion required by the Fourth Amendment."<sup>110</sup> The case was spurred in part by the February 1999 death of unarmed Amadou Diallo, who was shot by four SCU officers,<sup>111</sup> as well as by the release of statistics which, according to *Daniels*, demonstrated that the NYPD's stop-and-frisk encounters disproportionately targeted Black and Latino men.<sup>112</sup>

The filing of *Daniels* also coincided with widespread public frustration with law enforcement. Police departments across the country were accused of engaging in rampant racial profiling and of detaining individuals with much less than "reasonable suspicion," the standard required to initiate a *Terry* stop.<sup>113</sup> In addition to *Daniels*, lawsuits alleging racial profiling were brought in Los Angeles, New Jersey, Philadelphia, and Hobbs, New

106. Civil Docket, *Daniels v. City of New York*, 198 F.R.D. 409 (S.D.N.Y. Mar. 8, 1999) (No. 99-cv-1695-SAS).

107. "Section 1983 provides individuals with a cause of action against persons who violate their Fourth Amendment rights under color of state law." Todd E. Pettys, *Instrumentalizing Jurors: An Argument Against the Fourth Amendment Exclusionary Rule*, 37 FORDHAM URB. L.J. 837, 869 (2010); *Brown v. City of Oneonta*, 221 F.3d 329, 340 (2d Cir. 2000) (recognizing § 1983 claim based on "allegedly unlawful *Terry* stop").

108. CTR. FOR CONSTITUTIONAL RIGHTS, *Daniels, et al., v. the City of New York*, <http://ccrjustice.org/ourcases/past-cases/daniels,-et-al.-v.-city-new-york> (last visited Apr. 7, 2014); Goldstein, *supra* note 6 ("From one of the wooden wheels used to assign cases in Federal District Court in Manhattan, a judge's name was drawn: Shira A. Scheindlin.").

109. CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 108; Goldstein, *supra* note 6.

110. *Daniels v. City of New York*, 198 F.R.D. 409, 411 (S.D.N.Y. 2001) ("Rather, SCU officers have improperly used racial profiling, not reasonable suspicion, as the basis for the stops and frisks.").

111. Noah Kupferberg, *Transparency: A New Role for Police Consent Decrees*, 42 COLUM. J.L. & SOC. PROBS. 129, 142 (2008).

112. *Id.*

113. *Id.* at 130.



Mexico,<sup>114</sup> by both the Department of Justice and by independent civil rights groups.<sup>115</sup>

*Daniels* was the first lawsuit to bring the NYPD's stop-and-frisk practices "under fire."<sup>116</sup> The plaintiffs were successful in winning class certification<sup>117</sup> and in negotiating a sweeping settlement, which required the NYPD to create a written policy regarding racial profiling compliant with the United States and New York Constitutions, to train officers regarding the same, and to ensure compliance with the policy.<sup>118</sup> The named plaintiffs were awarded damages totaling \$167,500<sup>119</sup> and their counsel received over \$3.5 million in costs and fees.<sup>120</sup>

Unusually—and crucially for future litigation—the settlement also required police to complete a written form each time they conducted a stop-and-frisk (known as "UF-250 Reports")<sup>121</sup> and to provide plaintiffs' counsel with quarterly data regarding these reports "from the last quarter of 2003 through the first quarter of 2007."<sup>122</sup> Judge Scheindlin retained jurisdiction over the case and oversaw implementation of the settlement.

The *Daniels* parties returned to Judge Scheindlin's courtroom in 2007. The plaintiffs accused the NYPD of a "surge" in the very kind of illegal stops at issue in their original complaint.<sup>123</sup> Instead of reopening *Daniels*, Judge Scheindlin suggested another approach.<sup>124</sup> "If you got [sic] proof of inappropriate racial profiling in a good constitutional case, why

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114. *Id.* at 134–40 (discussing New Jersey and Los Angeles lawsuits); Heidi Boghosian, *Applying Restraints to Private Police*, 70 MO. L. REV. 177, 214–15 (2005) (discussing Philadelphia and New Mexico lawsuits).

115. Kupferberg, *supra* note 111, at 131.

116. *Southern District of New York Certifies Class Action Against City Police for Suspicionless Stops and Frisks of Blacks and Latinos*, 126 HARV. L. REV. 826, 827 (2013).

117. Stipulation of Settlement at 2, *Daniels v. City of New York*, 198 F.R.D. 409 (S.D.N.Y. 2013) (No. 99-cv-1695-SAS), available at [http://ccrjustice.org/files/Daniels\\_StipulationOfSettlement\\_12\\_03\\_0.pdf](http://ccrjustice.org/files/Daniels_StipulationOfSettlement_12_03_0.pdf).

118. See Motion for Reconsideration at 1, *Daniels v. City of New York*, 198 F.R.D. 409 (S.D.N.Y. 2013) (No. 99-cv-1695-SAS), 2007 WL 2077150 [hereinafter Motion for Reconsideration].

119. Kupferberg, *supra* note 111, at 143 n.91.

120. Stipulation and Order of Settlement at 32, *Daniels v. City of New York*, 198 F.R.D. 409 (S.D.N.Y. Mar. 8, 1999) (No. 99-cv-1695-SAS). Plaintiffs' counsel Debevoise & Plimpton received approximately \$1.7 million; the Center for Constitutional Rights received approximately \$700,000; Moore & Goodman, LLP received approximately \$925,000; and Van Lierop Burns and Associates received approximately \$132,000. *Id.*

121. Motion for Reconsideration, *supra* note 118.

122. *Floyd et al. v. City of New York, et al.*, CTR. FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/floyd> (last visited Apr. 2, 2014).

123. Goldstein, *supra* note 6.

124. *Id.*

don't you bring a lawsuit?" the judge asked.<sup>125</sup> "You can certainly mark it as related," she added.<sup>126</sup>

If *Daniels* had never included a settlement term that mandated the creation of documents (UF-250s) requiring police officers to document what exactly their reasons for conducting a stop-and-frisk were and then hand those documents over to counsel attuned to finding constitutional violations in those very documents, future stop-and-frisk litigation might never have been filed. Not only did *Daniels* signal that Judge Scheindlin was a plaintiff-friendly stop-and-frisk judge, it also created a document that itself might supplant an officer's own testimony to fill in (or highlight the absence of) reasonable suspicion.

*Daniels* changed the lay of the land with respect to the standard of proof required to prove an unreasonable stop under the Fourth Amendment by supplanting *Terry*'s "reasonable suspicion" standard with completion of forms the NYPD had to turn over to interested counsel. The UF-250s are the hallmark of recent stop-and-frisk litigation, yet they have never been endorsed by any court other than the Southern District of New York. This is significant. Police department policies with which police employees must conform do *not* "set[ ] the boundaries for reasonableness under the Fourth Amendment."<sup>127</sup>

B. *Subsequent Landmark Stop-and-Frisk Cases Are Assigned to Judge Scheindlin*

On January 31, 2008, the Center for Constitutional Rights and an attorney named Jonathan Moore, both of whom served as plaintiffs' counsel in *Daniels*, brought *Floyd v. City of New York*. Like *Daniels*, *Floyd* was brought pursuant to Section 1983 and alleged that the NYPD engaged in stop-and-frisk practices that violated the Fourth Amendment.<sup>128</sup> Like *Daniels*, *Floyd* is a landmark case.<sup>129</sup> Judge Scheindlin described it as one of "great public concern," so grave that "twenty-seven of the fifty-one members of the New York City Council" filed an amicus brief arguing that the practices create "a growing distrust of the NYPD on the part of Black and Latino residents."<sup>130</sup>

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125. *Id.*

126. *Id.*

127. *Couture v. Bd. of Educ. of Albuquerque Pub. Sch.*, 535 F.3d 1243, 1255 (10th Cir. 2008) (citing *Davis v. Scherer*, 468 U.S. 183, 193 (1984)).

128. Complaint, *Floyd v. City of New York*, 283 F.R.D. 153 (S.D.N.Y. 2012) (No. 08-cv-01034-SAS-HBP).

129. *Floyd et al. v. City of New York, et al.*, Press Kit, CENTER FOR CONSTITUTIONAL RIGHTS, available at <http://ccrjustice.org/floyd-trial-presskit.html> (last visited Apr. 2, 2014) (describing *Floyd* as "the culmination of more than 15 years of work by the Center for Constitutional Rights and the solid determination of a citywide movement that has made stop and frisk a central issue in New York City politics").

130. *Floyd v. City of New York*, 283 F.R.D. 153, 159–60 (S.D.N.Y. 2012).

The *Floyd* plaintiffs also won class certification. The class was broadly-defined, consisting of:

All persons who since January 31, 2005 have been, or in the future will be, subjected to the New York Police Department's policies and/or widespread customs or practices of stopping, or stopping and frisking, persons in the absence of a reasonable, articulable suspicion . . . . persons stopped or stopped and frisked on the basis of being Black or Latino in violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>131</sup>

Its forward-looking definition of the class members as including all persons who "in the future will be[ ] subjected to the [NYPD]'s policies . . . of . . . stopping and frisking[ ] persons" without reasonable suspicion is so broad that it potentially includes any resident of New York City.

The *Floyd* lawsuit benefitted from the terms of the *Daniels* settlement, and in particular its requirements that the police complete a written form each time they conducted a stop-and-frisk and that the City of New York provide data regarding the forms to plaintiffs' counsel.<sup>132</sup> The data was "indispensable" evidence for the *Floyd* plaintiffs' counsel. In fact, *Floyd*'s filing was prompted by an analysis of the data, which allegedly revealed that "the NYPD has continued to engage in suspicion-less and racially pretextual stop-and-frisks."<sup>133</sup>

On the same date *Floyd* was filed, a docket entry unattributed to either plaintiffs or defendants noted that *Floyd* had been referred to Judge Scheindlin as "possibly related" to *Daniels*.<sup>134</sup> On February 15, 2008, a "Notice of Assignment" officially sent *Floyd* to Judge Scheindlin.<sup>135</sup> The Notice stated that the case was assigned pursuant to "the memorandum of the Case Processing Assistant,"<sup>136</sup> which was not attached and is not available on the docket.

The Southern District's rules regarding related cases do not contemplate any role for a case processing assistant. Rather, any civil action, once filed in the Southern District, is to be "assigned by lot . . . to a district judge for all purposes."<sup>137</sup> That is, it is not automatically referred to the judge who may have a related case. According to the local rules, *after* being

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131. *Id.* at 160 (emphasis added).

132. *Floyd et al. v. City of New York, et al.*, CTR. FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/floyd> (last visited Apr. 2, 2014).

133. *Id.*

134. Case Referral, *Floyd v. City of New York*, 283 F.R.D. 153 (S.D.N.Y. Jan. 31, 2008) (No. 08-cv-01034-SAS-HBP).

135. Notice of Case Assignment, *Floyd v. City of New York*, 283 F.R.D. 153 (S.D.N.Y. Jan. 15, 2008) (No. 08-cv-01034-SAS-HBP).

136. *Id.*

137. 2013 Division of Business Rules, *supra* note 9, Rule 13.

randomly assigned, a related case may then be transferred to the judge presiding over an earlier-filed related case after a party designates it as potentially related to another matter.<sup>138</sup> The judge with the earlier-filed case then decides whether to accept or reject the transferred case.<sup>139</sup>

Though the *Floyd* complaint referenced *Daniels* several times,<sup>140</sup> it did not designate *Floyd* as related to *Daniels*, even though the Southern District's local rules impose a duty on "each attorney appearing in any civil or criminal case to bring promptly to the attention of the Court all facts which said attorney believes are relevant to a determination that said case and one or more pending civil or criminal cases should be heard by the same Judge."<sup>141</sup> Though Judge Scheindlin accepted *Floyd* as a case related to *Daniels*, she did so according to a procedure not contemplated by the local rules.

On January 28, 2010, *Davis v. City of New York*,<sup>142</sup> a case challenging the NYPD's "vertical patrols"<sup>143</sup> in New York public housing on the grounds that certain detentions made during those patrols lacked reasonable suspicion,<sup>144</sup> was also referred to Judge Scheindlin on the date it was filed. It was accepted as related to *Floyd* several days later.<sup>145</sup>

Like *Daniels* and *Floyd*, *Davis* is also an important case. According to Judge Scheindlin, it implicates "[t]he long line of cases concerning the power of the police to stop and frisk," and "illustrates the tensions between liberty and security in particularly stark form, because it deals with police practices in and around the home, where the interests in both liberty and security are especially strong."<sup>146</sup> In denying the City of New York's partial motion for summary judgment as to the plaintiffs' Fourth Amendment claims, Scheindlin cited the testimony of the president of a New York City

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138. Division of Business Rules, *supra* note 5, Rule 4(b).

139. 2013 Division of Business Rules, *supra* note 9, Rule 13(c)(i-2).

140. See Complaint at ¶¶ 26, 46, *Floyd v. City of New York*, 283 F.R.D. 153 (S.D.N.Y. Jan. 31, 2008) (No. 08-cv-01034-SAS-HBP).

141. S.D.N.Y. Loc. Civ. R. 1.6(a).

142. Complaint, *Davis v. City of New York*, No. 10-cv-00699-SAS (S.D.N.Y. Jan. 28, 2010).

143. "[V]ertical patrols are thorough sweeps of large apartment buildings by two or more police officers" which "provide an opportunity for the police to inspect public housing buildings for physical hazards" and "enable the police to sweep a building for potential lawbreakers." Adam Carlis, *The Illegality of Vertical Patrols*, 109 COLUM. L. REV. 2002, 2012 (2009).

144. See Complaint, *Davis v. City of New York* (S.D.N.Y. Jan. 28, 2010) (No. 10-cv-00699-SAS).

145. Notice of Case Assignment, *Davis v. City of New York* (S.D.N.Y. Feb. 8, 2010) (No. 10-cv-00699-SAS).

146. *Davis v. City of New York*, 959 F. Supp. 2d 324, 333 (S.D.N.Y. 2013) (internal quotation omitted).

public housing resident group, who compared New York Public housing to a “penal colony” supervised by the NYPD.<sup>147</sup>

In 2012, yet another landmark class action stop-and-frisk case came before Judge Scheindlin. On March 28, 2012, *Ligon v. City of New York*, a class action case challenging the NYPD’s trespass arrest policy, or “Operation Clean Halls,”<sup>148</sup> through which NYPD officers patrol private housing across New York City,<sup>149</sup> was referred to Scheindlin as potentially related to *Davis*, and it was soon after accepted as a related case.<sup>150</sup>

In January 2013, Judge Scheindlin granted the *Ligon* plaintiffs a preliminary injunction, finding sufficient evidence that certain trespass arrests violated the Fourth Amendment.<sup>151</sup> *Ligon*, like *Daniels*, *Davis* and *Floyd*, also raised significant legal issues, including the scope of the *Terry* ruling as applied to trespass arrests in private residences and accusations of racial profiling in arguably the nation’s most progressive city. In her injunction ruling, Scheindlin waxed philosophical:

For those of us who do not fear being stopped as we approach or leave our own homes or those of our friends and families, it is difficult to believe that residents of one of our boroughs live under such a threat. In light of the evidence presented . . . however, I am compelled to conclude that this is the case.<sup>152</sup>

Scheindlin postponed imposing any remedy in *Ligon*, instead choosing to consolidate the remedies hearing in *Ligon* with the remedies hearing in *Floyd*.<sup>153</sup> At the time, the liability portion of the *Floyd* trial—in fact any portion of the *Floyd* trial—had yet to commence. Even though *Floyd* had

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147. *Id.*; see generally *Case: Davis v. City of New York*, NAACP LEGAL DEFENSE FUND, <http://www.naacpldf.org/case/davis-vs-city-new-york> (last visited Apr. 2, 2014) (describing the questions presented by *Davis* as, *inter alia*, whether “residents of public housing in New York City [are] entitled to be free from police harassment in their homes just like other New Yorkers” and whether “NYC criminalized traveling home or visiting a friend while black or brown”).

148. Operation Clean Halls governed private buildings enrolled in a program known as the Trespass Affidavit Program, which purportedly allowed “police officers to patrol inside and around thousands of private residential apartment buildings throughout New York City.” *Ligon v. City of New York*, 925 F. Supp. 2d 478, 484–85 (S.D.N.Y. 2013). Many of the buildings subject to the program, though private residences, were large apartment complexes, and their residents faced quality-of-life challenges, such as rampant crime, similar to those confronted by residents of New York City public housing.

149. *Ligon v. City of New York*, N.Y. CIVIL LIBERTIES UNION, <http://www.nyclu.org/case/ligon-v-city-of-new-york-challenging-nypds-aggressive-patrolling-of-private-apartment-building> (last visited Apr. 2, 2014) (challenging the NYPD’s aggressive patrolling of private apartment buildings).

150. Notice of Case Assignment, *Ligon v. City of New York*, 1:12-cv-02274 (S.D.N.Y. April 3, 2012).

151. *Ligon*, 925 F. Supp. 2d at 483–84; Goldstein, *supra* note 6.

152. *Ligon*, 925 F. Supp. 2d at 486.

153. *Id.* at 523.

nothing to do with stops in private residences, Judge Scheindlin's prior conclusions that *Floyd* and *Ligon* were related resulted in linking the cases' liability findings by giving a preview of what would result in *Floyd* once *Ligon* was decided and tying two factually-dissimilar cases' remedies to one another. Moreover, the related cases rule permitted Judge Scheindlin to make a preliminary finding about *Floyd's* and *Ligon's* facts, and, before *Ligon* had even begun, make conclusions based on its later-filed complaint's unproven factual allegations. This effectively allowed a plaintiff to plead his way to a particular judge, regardless of the actual facts. By the time *Ligon* was filed, the *Davis* litigation had been through several rounds of heated discovery motions, and the parties' substantial differences were well-known.

On August 12, 2013, following a three-month bench trial in *Floyd*, Judge Scheindlin entered a 198-page "Opinion and Order." She granted a sweeping injunction against the NYPD: (a) ordering changes to NYPD policies and activities, (b) appointing a monitor to oversee stop-and-frisk practices, (c) requiring a "community-based joint remedial process to be conducted by a court-appointed facilitator," and, most remarkably, (d) ordering that one precinct in each of New York City's boroughs place body-worn cameras on their police officers.<sup>154</sup> The ruling received widespread national, and even international, press coverage.<sup>155</sup>

### C. Judge Scheindlin's Control Over Stop-and-Frisk Litigation Garner's Press Attention and Disparate Reactions From Those Involved in the Litigation

The *New York Times* noticed the case assignment pattern described above and reported that, ever since *Daniels* was filed, "new stop-and-frisk lawsuits are routed directly to Judge Scheindlin" because "civil rights groups, sometimes at the judge's suggestion, have designated the subsequent cases as 'related' to similar cases."<sup>156</sup> The paper noted that Judge Scheindlin has effectively acquired "near exclusive jurisdiction" over stop-and-frisk practices.<sup>157</sup> According to *The New Yorker*, ever since *Daniels*, when civil rights groups challenged the stop-and-frisk policies of the NYPD, they "have made sure that the cases went before Judge Scheindlin."<sup>158</sup>

Christopher Dunn, attorney for the *Ligon* plaintiffs, told the *New York Times*, "It would make no sense to have different judges handle the three stop-and-frisk cases."<sup>159</sup> "These are precisely the types of cases to

154. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 563 (S.D.N.Y. 2013).

155. See, e.g., Joseph Goldstein, *Judge Rejects New York's Stop-and-Frisk Policy*, N.Y. TIMES, Aug. 12, 2013, at A1; Williams & Deveraux, *supra* note 3.

156. Goldstein, *supra* note 6.

157. *Id.*

158. Toobin, *supra* note 93, at 40.

159. Goldstein, *supra* note 6.

have before a single judge,” he added.<sup>160</sup> Jonathan Moore, co-counsel for the plaintiffs in *Daniels*, in which his firm won approximately \$925,000 in costs and fees,<sup>161</sup> also serves as plaintiffs’ counsel in *Floyd*. During the *Floyd* trial, “Moore and his colleagues bound[ed] in and greet[ed] the Judge with confident half-smiles.”<sup>162</sup> Why wouldn’t they be smiling? In *Daniels*, not only had the same team of lawyers negotiated a settlement in front of Judge Scheindlin that appointed them semi-public monitors of the stop-and-frisk forms NYPD officers were forced to complete for purposes of determining a stop’s constitutionality, but *Daniels*, and Scheindlin’s supervision of *Daniels*, was a financially lucrative endeavor.<sup>163</sup>

Notably, the City of New York tried to convince Judge Scheindlin to send stop-and-frisk cases back to the clerk for random assignment.<sup>164</sup> NYPD Commissioner Ray Kelly believes that the judge “is very much in [the plaintiffs’] corner and has been all along throughout her career.”<sup>165</sup>

Judge Scheindlin has acknowledged that “‘some judges are less inclined to accept a case as related, [and] some judges are more inclined to accept it as related,’”<sup>166</sup> but declined to characterize herself as a judge more inclined to accept related cases. Nevertheless, the facts remain what they are—following random assignment of *Daniels*, Judge Scheindlin has presided over every single significant stop-and-frisk case in the Southern District. Some of this has been by operation of the “related cases” rule, and some apparently outside of it, but all of it has been expressly encouraged by the Judge herself and by a group of plaintiffs’ counsel, some of whom have made millions of dollars on these cases.

#### IV. NONRANDOM CASE ASSIGNMENT FUNDAMENTALLY ALTERS THE ROLE OF A DISTRICT COURT JUDGE

There are reasons why the parties winning stop-and-frisk cases in front of Judge Scheindlin prefer nonrandom case assignment. Arguably, as discussed below, it enables judges to shop for cases they like and then effect outcomes they like, or, at a minimum, think are just. The plaintiffs in the stop-and-frisk cases seemed to have taken note of a judge’s predisposition to rule in their favor.

Even if a motive to choose or influence a case can never be proven, the suggestion that a case has been steered to a particular judge’s docket for

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160. *Id.*

161. See Stipulation and Order of Settlement, *supra* note 120.

162. Toobin, *supra* note 93, at 39.

163. See also Katherine Macfarlane, *In Shira Scheindlin’s Courtroom, Stop-and-Frisk Lawyers Are the Only Winners*, N.Y. OBSERVER, NOV. 13, 2013, <http://observer.com/2013/11/stop-and-frisk-lawyers/>.

164. Goldstein, *supra* note 6.

165. Freeman, *supra* note 103.

166. Goldstein, *supra* note 6.



reasons having nothing to do with efficiency or practicality undermines confidence in the judiciary's procedures, which must be neutral at every stage, even at assignment. This effect—undermining confidence in what should be a neutral system, especially with respect to who hears what case—is reason enough to do away with nonrandom case assignment.

A. *Judicial Integrity Requires Neutral Case-Assignment Rules With No Role for Judicial Self-Selection of Cases*

“[J]udges are human and bring a basket of biases to the bench.”<sup>167</sup> As a result, “the particular judge assigned to a case . . . can be outcome determinative.”<sup>168</sup> When judges can pick cases, as they are permitted to do as a result of Southern District of New York's transfer and related cases rules, they may gain access to cases and affect the cases' outcomes for any number of reasons.<sup>169</sup> “Some may do so for jurisprudential reasons or out of perceived expertise,” while others may believe that the law has been misapplied and wish to correct a mistake.<sup>170</sup> “They may seek [a case assignment] to promote a judicial philosophy or set of moral principles,” or for very human reasons, such as a desire for notoriety.<sup>171</sup> To protect against the influence of a judge's bias, a judge must play no role in the case-assignment process.<sup>172</sup> Maintaining judicial integrity requires neutral assignment of cases.<sup>173</sup> Drawing an unfavorable judge is fair when it is a matter of luck, and nothing more.<sup>174</sup>

When neutrality is abandoned, the possibility that assignments were made in an effort to influence a case's outcome becomes very real.<sup>175</sup> Indeed, there is at least one instance of documented, deliberate, results-oriented case assignment in the federal court system. In the 1960s, panels in the Fifth Circuit Court of Appeals hearing civil rights cases were purposefully stacked with pro-civil rights majorities to ensure pro-civil rights outcomes.<sup>176</sup> In the fall of 1963, the Fifth Circuit was divided, with four members consistently voting in favor of civil rights plaintiffs and desegregation, and other members stubbornly refusing to extend the Fourteenth

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167. J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1103 (2000).

168. J. Robert Brown, Jr., *Non-Random Assignment of Federal Cases and Bank of America, THE RACE TO THE BOTTOM* (May 20, 2010, 6:00 AM), <http://www.theracetothetobottom.org/miscellaneous/non-random-assignment-of-federal-cases-and-bank-of-america.html> (last visited Apr. 2, 2014).

169. Brown & Lee, *supra* note 167, at 1066.

170. *Id.*

171. *Id.*

172. *Id.* at 1069.

173. *Id.* at 1041.

174. *Id.* at 1041.

175. *Id.* at 1040.

176. *Id.* at 1043.

Amendment in civil rights cases.<sup>177</sup> The Circuit's assigning judge steered certain cases he euphemistically deemed "touchy" to weeks in which certain judges—in particular, those who did not favor civil rights extensions—would be unable to participate.<sup>178</sup>

The judge who steered civil rights cases to panels more likely to enforce desegregation had an honorable, and morally just, end goal. Yet the method of directing these cases to known civil rights sympathizers was unjustifiable in that it delegitimized the procedure underlying the ultimately righteous outcome. This was especially risky given the controversial nature of the subject matter. Judges who side with the rights of minorities, but do so by skirting the system, risk jeopardizing any advances they make for the groups they seek to protect by introducing bias into the judicial system.

In the Fifth Circuit cases, questionable means were put to unquestionably just ends, but if court packing can happen in a case that results in a morally acceptable outcome (desegregation), the opposite is also true. If the Fifth Circuit's assigning judge had been a segregationist, he just as easily could have shifted these "touchy" cases toward the segregationist members of the court, rather than away from them. Nonrandom assignment of cases could permit a wrong-minded judge to affect a case's outcome.

Nonrandom assignment also has implications for the adversary system. Although party representation is "basic to our system of adjudication,"<sup>179</sup> when a judge chooses a case based on its subject matter, the judge steps out of his classic role as neutral adjudicator of the issues. This, like a judge who raises a point *sua sponte* when it is not argued by the parties, risks converting the federal system, one whose hallmark is its adversary nature, into one that looks more like an inquisitorial one.<sup>180</sup> When a judge picks a case for his own reasons, he starts to look less like a judge and more like someone with a stake in the litigation.

The Southern District's permissive related cases rule permits a judge to make a preliminary finding about two cases' facts, and, before the later-filed case has even begun, make conclusions based on the later-filed complaint's unproven factual allegations. This effectively allows a plaintiff to plead his way to a particular judge, regardless of the actual facts. For example, *Ligon v. City of New York*, filed on March 28, 2012, addressed the NYPD's trespass arrest policy, through which NYPD officers patrol private housing across New York City. On April 3, 2012, Judge Scheindlin

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177. *Id.* at 1047–48.

178. *Id.* at 1060–65.

179. *Arizona v. California*, 530 U.S. 392, 413 (2000); see William R. Casto, *Advising Presidents: Robert Jackson and the Destroyers-For-Bases Deal*, 52 AM. J. LEGAL HIST. 1, 130 (2012) ("The hallmark of an adversary system is two advocates pitted against each other in attempts to persuade a neutral judge.").

180. *Cf. United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., dissenting) (stating that he is relying on an argument not raised by the government).

accepted *Ligon* on the grounds that it was related to *Davis v. City of New York*, filed in 2010.<sup>181</sup> By the time *Ligon* was filed, the *Davis* litigation had been through several rounds of heated discovery motions, and the parties' substantial differences were well-known.

None of this was true in *Ligon*. The plaintiffs were different, the individual defendants were different—indeed, the only common defendant was the City of New York, an institutional defendant sued virtually every day—and the policies were different—police searches in public versus private housing. There was no real basis to deem these cases related. The thread connecting *Ligon* to *Daniels* was even thinner: *Daniels* has nothing to do with housing, either public or private.

In a pure adversarial system “[t]he trier of fact . . . does not independently investigate the facts, but instead remains neutral so as to avoid reaching a premature decision. Judges rely on the parties to frame the dispute and to present evidence as they see fit.”<sup>182</sup> When a judge plays a role in the case assignment process to determine relatedness by comparing the facts *alleged* in a later-filed case to those *established* in an earlier-filed, and more developed, matter, the judge is acting less like a neutral arbiter and more like an interested investigator, in the civil law mode.

#### B. *Judge Scheindlin's Appearance of Bias Is Reason Alone to Randomly Assign Stop-and-Frisk Cases*

##### 1. Judge Scheindlin Has Evidenced an Appearance of Anti-Police Bias

Judge Scheindlin's involvement in high-profile stop-and-frisk decisions, and her history of ruling against the NYPD, can be traced back to a case that appeared on her docket during the Giuliani era, which coincided with William Bratton's tenure as NYPD Commissioner. In 1995, Antonio Fernandez, known as “King Tone,” leader of the Latin Kings, a notorious drug gang targeted by the United States Attorney for the Southern District of New York, was arrested by an NYPD officer following a stop-and-frisk that revealed a small amount of marijuana on his person.<sup>183</sup> According to the arresting officer, as he approached Fernandez, “he smelled marijuana.”<sup>184</sup> He then frisked Fernandez along his waistband, the outside of his jacket, and down his pants leg; when he passed over the pants pocket, the officer heard a crinkling sound. He then recovered a small amount of marijuana from Fernandez's pocket.<sup>185</sup> Fernandez was taken to a police

181. Notice of Case Assignment at 2, *Ligon v. City of New York*, 1:12-cv-02274 (S.D.N.Y. April 3, 2012).

182. Henry S. Noyes, *The Rise of the Common Law of Federal Pleading: Iqbal, Twombly, and the Application of Judicial Experience*, 56 VILL. L. REV. 857, 864 (2012).

183. Toobin, *supra* note 93, at 38.

184. *United States v. Fernandez*, 943 F. Supp. 295, 297 (S.D.N.Y. 1996).

185. *Id.*

precinct and frisked again, at which point a loaded .38 caliber revolver was found in his pants.<sup>186</sup>

Officers arrived on the scene of Fernandez's arrest after receiving a radio run directing them to investigate a 911 call reporting a Latin Kings meeting in a Bronx park. "An anonymous caller had reported that at least one of the gang members was armed with a gun"; the armed individual was described as "a male Hispanic wearing a white jacket with black stripes."<sup>187</sup> Fernandez was wearing a jacket "similar" to the one described in the 911 call.<sup>188</sup>

The case was randomly assigned to Judge Scheindlin, who found that the officers lacked reasonable suspicion to stop Fernandez, due in part to the paucity of details provided by the anonymous caller and the fact that Fernandez's jacket did not exactly match the description provided by the caller.<sup>189</sup> As a result, Fernandez's initial detention was held unconstitutional and all evidence obtained pursuant to the stop was suppressed.<sup>190</sup>

Scheindlin also criticized the manner in which the revolver was discovered, stating that "[i]t is extremely difficult to believe that the [officer who located the marijuana in Fernandez's pant pocket] could have missed a bulky .38 caliber revolver hidden in Defendant's pants."<sup>191</sup> No reason was provided for the judge's belief that the officer's testimony was "extremely difficult" to believe. Indeed, that a gun may be found during a stationhouse frisk, but not at the scene of an arrest, is imminently plausible. An initial stop-and-frisk, made hastily and in public, where police are vulnerable to attacks from those who resent their mere presence, let alone their decision to make an arrest, is likely swift and not as thorough a search that occurs in the controlled environment of a precinct. Moreover, it may not be too surprising if the leader of a notorious gang were skilled in hiding weapons. To jump to the conclusion that the officer's testimony was difficult to believe requires an underlying suspicion about officers' testimony in general. Arguably, the testimony cuts both ways, if not in the officer's favor, given the defendant's known criminal association.

The ruling in the Fernandez case "set a template for [Judge Scheindlin's] handling of criminal cases," in which she would go on to rule against the City when stop-and-frisk was in play.<sup>192</sup> A 2013 report commissioned by New York City Mayor Bloomberg's office concluded that Judge Scheindlin is "biased against law enforcement" because "she issues an unusually high number of written opinions finding that the

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186. *Id.*

187. *Id.* at 296.

188. *Id.* at 297.

189. *Id.* at 298.

190. *Id.* at 299.

191. *Id.* at 299–300.

192. Toobin, *supra* note 93, at 38.

NYPD and other law enforcement agencies make illegal searches and seizures.”<sup>193</sup> “Scheindlin came down against law enforcement in 60% of her written ‘search-and-seizure’ opinions dating to when she started on the bench in 1994 . . . the highest rate of any of the 16 current and former Manhattan federal judges the study looked at since 1990.”<sup>194</sup>

One of Judge Scheindlin’s law clerks told *The New Yorker* reporter Jeffrey Toobin that Judge Scheindlin “thinks cops lie.”<sup>195</sup> Given the secrecy surrounding anything that happens during a clerk’s time in chambers, this quote is telling. Moreover, “[i]n decision after decision, [Scheindlin] has found that cops have lied, discriminated against people of color, and violated the rights of citizens.”<sup>196</sup>

In Judge Scheindlin’s own words, she believes that “judges have a duty to protect individual rights because that’s what the Bill of Rights is all about.”<sup>197</sup> “Sometimes there is no precedent that constrains you and you can really strike out and write what you think is the right answer.”<sup>198</sup> The *Floyd* trial was her “greatest chance yet to rewrite the rules of engagement between the city’s police and its people.”<sup>199</sup>

The evidence that Judge Scheindlin believes that NYPD officers lie, coupled with her handpicking of a stream of high-profile Section 1983 stop-and-frisk cases and plaintiff-friendly outcomes in every single one of those cases (*Daniels*, *Floyd*, *Davis*, and *Ligon*), suggests at least an appearance of bias against the NYPD. This alone is reason enough to do away with the related cases rule, which, before it was modified, permitted an outcome-oriented judge to manipulate the case assignment system so that a particular type of case accumulated on her docket, and no one else’s.

## 2. *An Appearance of Bias Is Itself Reason to Eliminate Procedural Rules That Open the Door to Judicial Case-Shopping*

Even if Judge Scheindlin is not actually biased in the ways described above, the appearance of bias that inevitably follows a judge who makes decisions to assign herself a string of cases, like the stop-and-frisk matters, is reason to eliminate or minimize nonrandom case assignment. Several courts have recognized that nonrandom case assignment procedures can lead to the appearance of bias, which on its own should be avoided. In

193. Ginger Adams Otis & Greg B. Smith, *Judge vs. the NYPD*, NEW YORK DAILY NEWS, May 15, 2013, at 8, available at <http://www.nydailynews.com/new-york/federal-judge-weighing-stop-and-frisk-case-bias-cops-report-article-1.1344293>.

194. *Id.* (“By comparison Judge Lewis Kaplan had the next-highest percentage—or 30%—in which he ruled completely or partly against law enforcement, the study found.”).

195. Toobin, *supra* note 93, at 38.

196. *Id.* at 36.

197. Mark Hamblett, *Stop-And-Frisk Judge Relishes Her Independence*, N.Y. L.J., May 20, 2013.

198. *Id.*

199. Toobin, *supra* note 93, at 36.

*Cruz v. Abbate*, four defendants in criminal cases pending in Guam Superior Court each moved for random assignment of his case to one of the seven judges on the court.<sup>200</sup> The practice of the Superior Court's presiding judge was to assign each case to the judge of his choice, rather than to assign them randomly.<sup>201</sup> On appeal, Judge Kozinski, writing for the Ninth Circuit, noted that though "a defendant has no right to any particular procedure for the selection of the judge" before whom his criminal case is heard, he nevertheless "is entitled to have that decision made in a manner free from bias or the desire to influence the outcome."<sup>202</sup>

Though the court ultimately deemed the allegations of arbitrariness and unfairness too vague to address, the question raised was troubling enough for the opinion to include the pronouncement that courts "must take great pains to avoid any inference that [case] assignments are being made for an improper purpose," because "[t]he suggestion that the case assignment process is being manipulated for motives other than the efficient administration of justice casts a very long shadow."<sup>203</sup>

A similar principle was also recognized in *Yagman v. Baden*, a case brought in the Central District of California, which was transferred shortly before trial when the presiding judge became ill. The case was reassigned to District Judge Real, not by random assignment, but through an order executed by both the original and transferee judge.<sup>204</sup> The local rules expressly permitted voluntary transfer from one judge to another, so long as both consented.<sup>205</sup> Though the Ninth Circuit again deemed the allegations that the transfer was "suspicious" too vague to address, it did note, "Courts must be meticulously careful, when invoking direct transfer provisions . . . to avoid any improper appearance."<sup>206</sup> The court invoked the principle that guided the Supreme Court in *In re Murchison*: "to perform its high function in the best way, justice must satisfy the appearance of justice."<sup>207</sup>

In *Murchison*, the Court overturned a Michigan conviction involving a trial court judge who had also served as a one-man grand jury on the very charges tried before him.<sup>208</sup> The Court noted that the judge was likely unable to "free himself from the influence of what took place in his 'grand-jury' secret session," and that "[h]is recollection of that is likely to weigh far more heavily with him than any testimony given in the open

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200. *Cruz v. Abbate*, 812 F.2d 571, 572 (9th Cir. 1987).

201. *Id.*

202. *Id.* at 574.

203. *Id.*

204. *Yagman v. Baden*, 796 F.2d 1165, 1177 (9th Cir. 1986).

205. *Id.*

206. *Id.* at 1177-78.

207. *Id.* at 1178 (internal quotations and citations omitted).

208. *In re Murchison*, 349 U.S. 133, 139 (1955).

hearings.”<sup>209</sup> Also, “the judge was doubtless more familiar with the facts and circumstances in which the charges were rooted than was any other witness.”<sup>210</sup>

The procedure allowed by the Michigan court was itself unconstitutional, even in the absence of proof of actual prejudice, because it raised a probability of unfairness.<sup>211</sup> In the criminal context, fairness requires both the absence of “actual bias” and also the absence of “the probability of unfairness.”<sup>212</sup> At the extreme of this principle is the established notion that “no man can be a judge in his own case,” but the far subtler question is whether a judge can try cases in which he “has an interest in the outcome.”<sup>213</sup>

What counts “an interest in the outcome” is a slippery question. Traditional notions of familial or financial interest of course would apply, but a judge may also be “interested” in an outcome for personal reasons, intellectual interest, political agendas, or even by the chance of case-related notoriety (good or bad). But precisely because “an interest” cannot be defined, the safer course, at least in the criminal context, is to avoid procedures which offer even a temptation “not to hold the balance nice, clear, and true between the State and the accused,” as such procedures, on their own, violate due process.<sup>214</sup> This is true even though such a rule “may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.”<sup>215</sup> In essence, “‘justice must satisfy the appearance of justice.’”<sup>216</sup>

The related case rule raises the same concern: in *Murchison*, the judge may not have been able to “free himself from the influence of what took place in his ‘grand-jury’ secret session.”<sup>217</sup> In making the related cases decision, the judge deciding whether to accept a later-filed case may be unable to free herself from the influence of what occurred in the allegedly-related first-filed matter, over which the judge also presided.

Though they do not implicate an individual’s personal liberty, the stakes in civil rights litigation are also high. The stop-and-frisk litigation before Judge Scheindlin has already cost the City of New York millions of

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209. *Id.* at 138.

210. *Id.* “In either event the State would have the benefit of the judge’s personal knowledge while the accused would be denied an effective opportunity to cross-examine. The right of a defendant to examine and cross-examine witnesses is too essential to a fair trial to have that right jeopardized in such way.” *Id.* at 139.

211. *Brown & Lee, supra* note 167, at 1100.

212. *Id.*

213. *Id.*; *see also id.* at 1100 n.379.

214. *In re Murchison*, 349 U.S. at 136 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

215. *Id.*

216. *Id.*

217. *Id.* at 138.



dollars in fees, costs, and damage awards. The August 12, 2013 decision will also deplete city coffers. As former NYPD first deputy commissioner John Timoney has explained:

The training regimen laid out by Judge Scheindlin will require transferring dozens of officers from precincts and permanently reassigning them to the police academy as trainers. Because minimum staffing levels are required by the department, much of the new training will have to be done on overtime, unless the city spends money to expand the number of officers.

Front-line ranking officers (sergeants and lieutenants) will likely require one week of training, while patrol officers and detectives will require at least two days. My estimate is that this remedial process will cost tens of millions of dollars and last at least 10 years. This does not include the incalculable but sizable costs of taking an officer off patrol for training. Nor does it include the cost of the monitor, staff, expert advisers or the yet-to-be-named facilitator and his or her staff.<sup>218</sup>

The public interest at stake in stop-and-frisk litigation is twofold: not only do residents of the City of New York have a right to their personal liberties, the same group of people also have a right to, for example, public housing, trash collection, and safe streets, amenities whose budgets are all affected by costly litigation, especially that which requires the purchase of bodyworn cameras and training officers on overtime pay.

C. *The Related Cases Rule Converts District Judges Who Hoard One Category of Cases Into Quasi-Appellate Judges*

The decisions of a single judge in one district are not binding on other judges in that same district.<sup>219</sup> This principle respects the hierarchal structure of the federal court system. Yet allowing one judge to collect a stream of factually distinct cases in order to affect a distinct area of the law elevates that judge over other judges in her district. Because no other judge has the opportunity to hear landmark stop-and-frisk cases, the judge who does hear the cases has the opportunity to shape the law in a similar manner an appellate court would.

Also, once an issue as important as the NYPD's stop-and-frisk procedures reaches the appellate level of review, it will only have been vetted by one jurist. A difference in opinion may have guided the Second Circuit's, and ultimately the Supreme Court's, analysis of a complicated area of the law. Yet when these cases are appealed, the higher courts will only have

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218. John Timoney, *The Real Costs of Policing the Police*, N.Y. TIMES, Aug. 19, 2013 at A19.

219. *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2540 (2011).

one voice to consider: that of Judge Scheindlin. This is, of course, her point.

V. THE SOUTHERN DISTRICT'S LOCAL RULES SHOULD BE AMENDED  
TO AVOID MANIPULATION OF CASE ASSIGNMENT PROCEDURES

As this Article highlights, it has been far too simple to use the Southern District of New York's case assignment rules to manipulate case assignments. The case assignment rules have created an appearance of bias and have facilitated case-shopping by district judges interested in a given case's subject matter and outcome. The below-proposed amendments to the Southern District's rules would reinstate random case assignment as the default procedure.<sup>220</sup>

A. *All Rules Permitting Subject-Matter-Specific Case Selection Should  
Be Eliminated*

There is no reason to permit senior judges or visiting judges to pre-select the "category" of cases he is willing to undertake. First, with respect to senior judges, their caseloads can be lessened by permitting them to advise the district as to the number of cases they are willing to take—a consideration already in place in the Southern District. There is no reason to also allow them to craft a specialized docket, as this sort of subject-matter-specific case selection could result in assignment of an entire category of cases (Section 1983, habeas, securities) to one judge alone. Senior or otherwise, district judges are appointed to the federal bench to hear all cases. And there are opportunities within the federal courts for judges who want to hear only a limited category of cases, such as bankruptcy court and the United States Court of Appeals for the Federal Circuit. The Southern District of New York, however, is not a specialized court, and any judge appointed to the Southern District should not become a specialized judge.

Second, there is also no reason to allow visiting judges to pre-select the category of case he is willing to accept. Again, the workload given to visiting judges can be lessened by limiting the number of cases a visiting judge takes on—a safeguard already in place in the Southern District's rules. Moreover, visiting judges are only permitted to visit a court other than the one to which they were appointed when the need for such a visit arises in the court they visit. Allowing visiting judges to pre-select a category of cases permits them to pre-select the kind of cases they wish to hear, which risks assigning an entire category of cases disproportionately to one judge. In addition, this practice undermines the purpose of allowing

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220. As explained in the Afterword, some but not all of the recommendations made in this section have been implemented by the Southern District of New York. Yet only the related cases rule was reworded; the long list of remaining rules that permit subject matter-specific manipulation of cases remain and are not subject to motion practice or public docketing. The assignment committee's membership is still anonymous.

judges to visit other courts; the practice is intended to service the courts' certified needs, not the judge's jurisprudential interests.

The prior version of the transfer of related cases rule, which gave the judge to whom a case was referred as potentially related the "sole discretion" to accept or reject a later-filed case, sidestepped any examination of actual relatedness and facilitated the hoarding of cases based on subject matter.

Similarly, the "transfer of cases by consent" rule, which remains unchanged, allows any judge to "transfer directly any case or any part of any case . . . to any consenting judge" in the Southern District, endorses a secret conversation between judges about which kind of cases they want on their dockets, and then permits transfer of cases for reasons both proper and improper. This practice eviscerates random case assignment and endorses case transfer for any reason the transferor or transferee judge has in mind. Perhaps worst of all, the reason is never made public and is not subject to challenge by the affected parties.

#### B. *All Assignment Committee Decisions Should Be Made Public*

Given the complicated nature of federal litigation, there is obviously a need for district-wide committees that oversee and manage certain aspects of case assignment. But there is no reason to keep such decisions hidden from the public. Moreover, the members of the assignment committee should be made known. The Southern District of New York's assignment committee "rule[s] upon all issues relating to assignments," but what exact "issues related to assignments" are is not explained. Without full disclosure of case assignment decisions, the Southern District risks an appearance of bias and impropriety in its case-assignment methods. If the system is fair, there is no reason to hide it from the public and the parties subject to the committee's decisions.

#### C. *The Related Cases Determination Should Be Subject to Motion Practice*

The prior version of the related cases rule left the decision to accept a later-filed case as related to an earlier-filed matter within the sole discretion of the judge to whom the potentially related case is referred. As explained above, this created the appearance of bias and incentivized judicial case-shopping. But even if the rule is rewritten to take the decision out of the hands of the judge to whom the case is referred, the related cases rule remains problematic.

A party who advocates for the related case designation likely wants to appear in front of the judge who handled the earlier case—as has clearly happened in stop-and-frisk litigation. Given the potential granting of the assignment, that party should be required to move for the related case designation, and the other party allowed to oppose. Moreover, that motion should not be heard by the judge to whom the case is originally assigned, as that judge may have self-interested reasons to avoid a case's subject mat-

ter, nor should be it heard by the judge presiding over the earlier-filed case, who may have reasons to take on the case's subject matter. Rather, this is precisely the kind of motion appropriately heard by the assignment committee.

### CONCLUSION

That the NYPD stop-and-frisk litigation is venued in the Southern District of New York is significant. The Southern District is one of the most influential federal courts.<sup>221</sup> An appointment to the Southern District of New York is prestigious, and may lead, as in the case of Justice Sonia Sotomayor, to the Supreme Court.<sup>222</sup> The Southern District is also "an 'important venue for corporate and white-collar prosecutions, and its pronouncements are highly influential.'"<sup>223</sup> Judge Scheindlin herself is an oft-cited jurist, whose opinion in *Zubulake v. UBS Warburg LLC*<sup>224</sup> is regarded as one of the most important decisions regarding e-discovery;<sup>225</sup> her decisions are "must-reads."<sup>226</sup> She has also issued important orders in the context of the federal material witness statute.<sup>227</sup> Judge Scheindlin is often at the forefront of important constitutional issues in one of the most respected, and oft-cited, districts.

Additional reasons suggest that the Fourth Amendment litigation pending before Judge Scheindlin will have far-reaching impact. *Daniels*, *Davis*, *Floyd*, and *Ligon* have each already garnered attention in academic scholarship.<sup>228</sup> The *Floyd* trial was the subject of multiple *New York Times*

221. William K. Ford, *Judging Expertise in Copyright Law*, 14 J. INTEL. PROP. L. 1, 41 (2006).

222. Kevin R. Johnson, *An Essay on the Nomination and Confirmation of the First Latina Justice on the U.S. Supreme Court: The Assimilation Demand at Work*, 30 CHICANO-LATINO L. REV. 97, 100 (2011).

223. Trent O. Bridges, *U.S. v. Stein: Federal Prosecutors Twisting the Arm of Corporate America While Its Employees Cry Uncle (Sam)*, 43 TULSA L. REV. 739, 764 (2008).

224. 382 F. Supp. 2d 536 (S.D.N.Y. 2005).

225. Kevin F. Brady, *Recent Key Delaware Corporate and Commercial Decisions*, 6 N.Y.U. J. L. & BUS. 421, 456–57 (2010).

226. *Id.* at 457.

227. Nadine Strossen, *Freedom and Fear Post 9/11: Are We Again Fearing Witches and Burning Women?*, 31 NOVA L. REV. 279, 302 n.152 (2007) ("Judge Shira A. Scheindlin . . . issued an important decision concerning . . . Osama Awadallah, a Jordanian-born student who was charged with making false statements at a grand jury proceeding."); Toobin, *supra* note 93, at 43 ("Scheindlin threw out the case against Awadallah pre-trial; Awadallah's name was discovered on a scrap of paper in a car rented by one of the September 11, 2001 hijackers. Scheindlin was reversed by the Second Circuit, but Awadallah was ultimately acquitted.").

228. See, e.g., Kupferberg, *supra* note 111, at 141–44 (discussing the impact of the terms of the *Daniels* settlement); Rachel Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 792–93 (2012) (discussing the *Davis* litigation in the context of challenges to racial profiling and stop-and-frisk policing); Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1102 (2013) (discussing the *Ligon* litigation); Steiker, *supra* note 90, at 330–31 (discussing *Floyd* and its connection to *Daniels*).

op-ed pieces, all highly critical of the NYPD's stop-and-frisk practices.<sup>229</sup> At least one scholar has argued that the burdens *Terry*-stops inflict "are most visible in New York."<sup>230</sup> A June 2012 protest against the NYPD's stop-and-frisk practices was covered extensively not only by New York media outlets, but also by the *Guardian* and *Al Jazeera*.<sup>231</sup>

Further, "[n]ational experts have publicly debated the role of the stop-and-frisk program in either producing or threatening New York City's vaunted crime drop of the past two decades."<sup>232</sup> The survival or demise of New York City's stop-and-frisk regime may impact the decision to pursue similar police tactics in other large metropolitan areas, such as Philadelphia and San Francisco.<sup>233</sup> Philadelphia and Los Angeles compile data, as New York did, on "stops and frisks,"<sup>234</sup> and a ruling in the Scheindlin cases may encourage costly litigation in those cities.

The NYPD's current stop-and-frisk practices are arguably a reflection of the Supreme Court's extension of police authority post-*Terry*.<sup>235</sup> If any of Judge Scheindlin's decisions are appealed to the Supreme Court, they may have the opposite outcome of the one Judge Scheindlin intended. The current Court has not hesitated to expand police authority. If given the chance to review Judge Scheindlin's broad expansion of Fourth Amendment rights, the Court may reverse her decisions and contract the rights at issue.<sup>236</sup>

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229. See, e.g., *Stop-and-Frisk On Trial*, N.Y. TIMES, May 22, 2013, at A26 (addressing the *Floyd* trial and concluding that "stopping hundreds of thousands of law-abiding residents—who don't need to be deterred from violent behavior—does not reduce crime"); *Mr. Bloomberg's Logic*, N.Y. TIMES, July 2, 2013, at A24 (discussing *Floyd* and New York City Mayor Bloomberg's position regarding stop-and-frisk, stating that "[i]f . . . Bloomberg was trying to stem the criticism of his constitutionally suspect stop-and-frisk policy over the weekend, he took a rather strange approach with his loopy logic and discredited arguments").

230. See Harmon, *supra* note 226, at 792.

231. See Steiker, *supra* note 90, at 329–31.

232. *Id.* at 331.

233. *Id.* at 331–32.

234. DELORES JONES-BROWN ET AL., STOP, QUESTION & FRISK POLICING PRACTICES IN NEW YORK CITY: A PRIMER, CENTER ON RACE, CRIME AND JUSTICE, JOHN JAY COLLEGE OF CRIMINAL JUSTICE 4–5 (Mar. 2010), available at [http://www.jjay.cuny.edu/web\\_images/PRIMER\\_electronic\\_version.pdf](http://www.jjay.cuny.edu/web_images/PRIMER_electronic_version.pdf).

235. Cf. Steiker, *supra* note 90, at 332–33. Steiker places the blame for the expansion of police authority post-*Terry* at the feet of Chief Justice William Rehnquist. *Id.* at 357–58. She contends that in *Terry*, Chief Justice Earl Warren meant to announce a limited rule, confined to narrow bounds that recognized "the seriousness of the intrusion imposed by police stop-and-frisks[.]" *Id.* at 334. By contrast, "Rehnquist's views and innovations . . . shaped a constitutional doctrine that is flexible or pernicious enough . . . to prompt law enforcement practices like the NYPD's current stop-and-frisk program." *Id.* at 333. "[C]urrent stop-and-frisk practices are the legacy of Rehnquist's Promethean *Terry*, much more than Warren's 'bounded' version." *Id.* at 358.

236. The *Floyd* decision also treats disparate impact as an established manner of proving discriminatory intent for purposes of an Equal Protection claim. See *Floyd v. City of New York*,

Like the Fifth Circuit judge who packed civil rights cases with desegregationist judges, Judge Scheindlin's positions may be guided by the right moral compass and ultimately vindicated, if not by the Supreme Court, then by history. But the manner in which the Southern District of New York's local rules have allowed one judge to select certain cases, and use them to shape the development of important Constitutional law, gives off such an appearance of impropriety that the procedures which allow for such practices must be eliminated. Ultimately, "[T]o perform its high function in the best way, justice must satisfy the appearance of justice."<sup>237</sup>

#### AFTERWORD

Much has happened since this Article was posted on the Social Science Research Network (SSRN) and submitted to law reviews and journals for publication consideration on August 22, 2013. A brief summary of the manner in which the Article came into being, and how it appears to have perhaps influenced the stop-and-frisk cases themselves, is included below. More importantly, this Afterword updates the current status of the *Floyd* and *Ligon* matters, which have taken unprecedented procedural twists on appeal.

The Article's current form is relatively similar to the draft that was circulated back in August. Like the draft, it argues that nonrandom case assignment is problematic and that nonrandom case assignment affected the development of important stop-and-frisk precedent in the Southern District of New York. The August 22, 2013 draft included a section entitled "How Landmark Section 1983 Stop-and-Frisk Litigation Found Its Way to Judge Scheindlin, and Never Left."<sup>238</sup> It described, as the current Article still does, how *Floyd* was assigned to Judge Scheindlin following a hearing in *Daniels*, at which Judge Scheindlin asked the *Daniels* plaintiffs' lawyers, "'If you got [sic] proof of inappropriate racial profiling in a good constitutional case, why don't you bring a lawsuit?'"<sup>239</sup> It also noted that

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08 Civ. 1034 (SAS) at \*29 (S.D.N.Y. Aug. 12, 2013), ECF No. 373 (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)). But civil rights attorneys, including the former chief of the Department of Justice's Civil Rights division Thomas Perez, have resisted bringing any disparate impact litigation that would potentially be appealed to the Supreme Court, because the current Court is likely to reject disparate impact theories. See, e.g., Terry Eastland, *Thomas Perez Makes a Deal*, THE WEEKLY STANDARD (May 27, 2013), [http://www.weeklystandard.com/articles/thomas-perez-makes-deal\\_724692.html](http://www.weeklystandard.com/articles/thomas-perez-makes-deal_724692.html). For this reason, Perez successfully negotiated the dismissal of a case set for oral argument before the Supreme Court on February 29, 2012. The case would have given the Court the opportunity to decline to extend disparate impact theory to the housing discrimination context and also might have eviscerated the theory in its entirety. *Id.*

237. *In re Yagman*, 796 F.2d 1165, 1178 (9th Cir. 1986) (internal quotation marks and citations omitted).

238. Katherine Macfarlane, *The Danger of Nonrandom Case Assignment: How the Southern District of New York's "Related Cases" Rule Has Shaped the Evolution of Stop-and-Frisk Law* 20 (Aug. 22, 2013) (draft on file with author & MICH. J. RACE & L.).

239. *Id.* at 22.

Judge Scheindlin remarked to the same counsel that “You can certainly mark it as related.”<sup>240</sup> These two quotes were attributed to Joseph Goldstein’s May 6, 2013 *New York Times* article, *A Court Rule Directs Cases Over Friskings To One Judge*.<sup>241</sup> Citations to Mr. Goldstein’s excellent piece, which served as the intellectual inspiration for this Article, remain in the Article’s current form.

The August 22, 2013 draft further noted that “[o]n January 31, 2008, the Center for Constitutional Rights and an attorney named Jonathan Moore, both of whom served as plaintiffs’ counsel in *Daniels*, brought *Floyd v. City of New York*.”<sup>242</sup> This statement appeared under the heading “Subsequent Landmark Stop-And-Frisk Cases Are Assigned To Judge Scheindlin.”<sup>243</sup> I included this statement following my own review of the *Floyd* and *Daniels* dockets. A later section in the August 22, 2013 draft, entitled “Judicial Integrity Requires Neutral Case-Assignment Rules With No Role For Judicial Self-Selection of Cases,”<sup>244</sup> included the sub-headings “Judge Scheindlin’s Appearance of Bias Is Reason Alone To Randomly Assign Stop-And-Frisk Cases” and “Judge Scheindlin Has Evidenced An Appearance of Anti-Police Bias.”<sup>245</sup> In the text following the latter heading, I made reference to “[a] 2013 report commissioned by New York City Mayor Bloomberg’s office” which concluded that Scheindlin is “biased against law enforcement” because “she issues an unusually high number of written opinions finding that the NYPD and other law enforcement agencies make illegal searches and seizures.”<sup>246</sup> Judge Scheindlin responded to the Bloomberg report in a May 19, 2013 interview with Associated Press reporter Larry Neumeister, calling it “a ‘below-the-belt attack’ on judicial independence.”<sup>247</sup> I did not cite this interview in my August 22, 2013 draft.

However, I cited to two additional sources in support of my argument that Judge Scheindlin had evidenced an appearance of anti-police bias. First, I cited Mark Hamblett’s May 5, 2013 *New York Law Journal* article, in which Judge Scheindlin expressed her position regarding constitutional cases, stating that “‘judges have a duty to protect individual rights because that’s what the Bill of Rights is all about.’”<sup>248</sup> In the same interview, she explained a district court judge’s role, stating that “[s]ometimes

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240. *Id.*

241. *Id.*

242. *Id.* at 23.

243. *Id.* at 22.

244. *Id.* at 29.

245. *Id.* at 32.

246. *Id.* at 34 (quoting Adams Otis & Smith, *supra* note 193).

247. Larry Neumeister, *NY Frisk Judge Calls Criticism “Below the Belt,”* THE ASSOCIATED PRESS, May 19, 2013.

248. Macfarlane, *supra* note 238, at 35 (quoting Hamblett, *supra* note 197).



there is no precedent that constrains you and you can really strike out and write what you think is the right answer.”<sup>249</sup> This statement in particular caught my attention as it suggested that the judge enjoyed opportunities to “strike out.”

My August 22, 2013 draft also made repeated references to Jeffrey Toobin’s May 27, 2013 *New Yorker* article in support of my contention that Judge Scheindlin held an anti-police bias. I recounted Toobin’s account of Judge Scheindlin’s handling of a motion to suppress in a criminal case involving Antonio Fernandez, aka “King Tone,” the leader of a drug gang.<sup>250</sup> Unlike Toobin, I also cited to the order Judge Scheindlin wrote in the Fernandez case and summarized the order, noting that “Judge Scheindlin . . . found that the officers lacked reasonable suspicion to stop Fernandez, due in part to the paucity of details provided by the anonymous caller, and the fact that Fernandez’s jacket did not exactly match the description provided by the caller” and that “Fernandez’s initial detention was held unconstitutional, and all evidence [including a revolver in Fernandez’s pocket] obtained pursuant to the stop was suppressed.”<sup>251</sup> I went on to analyze Judge Scheindlin’s opinion, explaining that:

Scheindlin also criticized the manner in which the revolver was discovered, stating that “[i]t is extremely difficult to believe that the [officer who located the marijuana in Fernandez’s pant pocket] could have missed a bulky .38 caliber revolver hidden in Defendant’s pants.”<sup>252</sup> No reason was provided for the judge’s belief that the officer’s testimony was “extremely difficult” to believe. Indeed, that a gun may be found during a stationhouse frisk, but not at the scene of an arrest, is imminently plausible. An initial stop-and-frisk, made hastily and in public, where police are vulnerable to attacks from those who resent their mere presence, let alone their decision to make an arrest, is likely swift and not as thorough a search that occurs in the controlled environment of a precinct. Moreover, it may not be too surprising if the leader of a notorious gang were skilled in hiding weapons.<sup>253</sup>

This argument highlighted my contention that Judge Scheindlin went out of her way to discredit otherwise reasonable police testimony.

I next cited Toobin’s conclusion that “[t]he ruling in the Fernandez case ‘set a template for [Judge Scheindlin’s] handling of criminal

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249. *Id.*

250. *Id.* at 32–33 (citing Toobin, *supra* note 93, at 38).

251. *Id.* at 33 (citing *United States v. Fernandez*, 943 F. Supp. 295, 299 (S.D.N.Y. 1996)).

252. *Id.* at 34.

253. *Id.*

cases,”<sup>254</sup> and his statement that one of her law clerks reported that Scheindlin “thinks cops lie.”<sup>255</sup> I concluded that “[t]he evidence that Judge Scheindlin believes that NYPD officers lie, coupled with her hand-picking of a stream of high-profile Section 1983 stop-and-frisk cases, and plaintiff-friendly outcomes in every single one of those cases, suggests at least an appearance of bias against the NYPD.”<sup>256</sup>

However, I never stated that Judge Scheindlin should be removed from any stop-and-frisk case. Rather, I argued that the manner in which the stop-and-frisk cases had been assigned to Judge Scheindlin “is reason enough to do away with the related cases rule, which, as it stands, permits an outcome-oriented judge to manipulate the case assignment system so that a particular type of case accumulates on her docket alone.”<sup>257</sup> I have elsewhere argued that Judge Scheindlin’s use of the related cases rule did not violate the rule itself, which, at the time Judge Scheindlin relied upon it, granted unfettered discretion to judges who wanted to pull certain cases onto their dockets.<sup>258</sup> To be abundantly clear, I never advocated for Judge Scheindlin’s removal, though I stand behind my conclusion that there is too much potential for abuse when judges can play a role in which cases end up on their dockets.

To everyone’s surprise, on October 31, 2013, the Second Circuit removed Judge Scheindlin from the *Floyd* and *Ligon* matters. In a three-page order, it concluded that Judge Scheindlin “ran afoul of the Code of Conduct for United States Judges” due to “the appearance of impartiality surrounding [the *Floyd* and *Ligon*] litigation [which] was compromised by the District Judge’s improper application of the Court’s ‘related cases rule.’”<sup>259</sup> In support of this conclusion, the court referred to the hearing cited in my August 22, 2013 draft (at which Judge Scheindlin instructed the *Daniels* plaintiffs’ attorneys how to file a related case).<sup>260</sup>

It also noted that “[t]wo of the attorney groups working on behalf of plaintiffs in *Daniels*, a case challenging the New York Police Department’s stop-and-frisk practices, helped file *Floyd* the next month.”<sup>261</sup> In

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254. *Id.* (quoting Toobin, *supra* note 93, at 38).

255. *Id.*

256. *Id.* at 35.

257. *Id.*

258. See, e.g., Katherine Macfarlane, *Procedure Takes Center Stage in Stop-and-Frisk Litigation*, SUMMARY JUDGMENTS, THE LOYOLA LAW SCHOOL, LOS ANGELES FACULTY BLOG (Nov. 18, 2013), <http://llsblog.lls.edu/faculty/2013/11/procedure-takes-center-stage-in-stop-and-frisk-litigation.html>.

259. Order Staying Opinions and Remanding for Implementation at 2, *Ligon v. City of New York*, No. 13-3123 (2d Cir. Oct. 31, 2013); *Floyd v. City of New York*, 13-3524 (2d Cir. Oct. 31, 2013), available at [http://www.nytimes.com/interactive/2013/11/01/nyregion/01frisk-ruling.html?\\_r=0](http://www.nytimes.com/interactive/2013/11/01/nyregion/01frisk-ruling.html?_r=0).

260. Order Staying Opinions and Remanding for Implementation at 2 n.1, *Ligon v. City of New York*, No. 13-3123 (2d Cir. Oct. 31, 2013).

261. *Id.* at 2–3 n.1.

support of this statement, the court included a “see generally” citation to Joseph Goldstein’s May 5, 2013 article. But Goldstein did not write that “two of the attorney groups working on behalf of plaintiffs in *Daniels* . . . helped file *Floyd*.” Rather, he referred to “the lawyers” who brought *Floyd*. They are never identified by name in his article, nor are they identified as “[t]wo . . . attorney groups.” This characterization, does, however, appear in my August 22, 2013 draft, in which I noted that Jonathan Moore and the Center for Constitutional Rights were counsel for plaintiffs in both *Daniels* and *Floyd*. The only attorney cited in the Goldstein piece, Christopher Dunn, was not involved in *Daniels*, and is not involved in *Floyd*. Rather, he is counsel for plaintiffs in *Ligon*, a case that was not at issue in the December 2007 hearing in *Daniels* or the January 2008 filing of *Floyd*. The court also concluded that Judge Scheindlin improperly applied the related- cases rule by engaging in “a series of media interviews and public statements purporting to respond publicly to criticism of the District Court.”<sup>262</sup> Like my August 22, 2013 draft, the court cited to Mark Hamblett’s May 5, 2013 piece and Toobin’s May 27, 2013 article.<sup>263</sup> It also cited to Larry Neumeister’s interview with Judge Scheindlin, in which she responded to the Bloomberg report I cited.<sup>264</sup> To the extent the Second Circuit was influenced by my work, I am both flattered and excited—this may signal that law review articles are being read by judges, despite reports to the contrary. That said, I did not expect a citation, as my draft was, at the time, available only on SSRN, and the primary sources I relied upon were also available to the court and its clerks. Moreover, the conclusion the court reached (that Judge Scheindlin should be removed) was different than my own.

The Honorable Richard Kopf, District of Nebraska, kindly noted that the “the intellectual foundation for [the Second Circuit’s] removal decision came directly from [my August 22] article.”<sup>265</sup> In a comment posted on November 5, he added that “[t]he only public and intellectually coherent analysis of (1) the ‘relatedness’ question *in this precise matter* and (2) an arguable lack of impartiality *in this precise matter* is found in Katherine McFarlane’s [sic] 45-page article that appeared shortly (2 months) before the Second Circuit issued the surprise ruling on Judge S.”<sup>266</sup> I am grateful for this incredible show of support and encouragement, as well as the gen-

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262. *Id.* at 2–3.

263. *Id.* at 3 n.2.

264. *Id.*

265. Richard G. Kopf, *More on “relatedness,” Judge Scheindlin and the Second Circuit*, HERCULES AND THE UMPIRE (Nov. 4, 2013), <http://herculesandtheumpire.com/2013/11/04/more-on-relatedness-judge-scheindlin-and-the-second-circuit/> (Nov. 5, 2013, 5:30 AM comment by Judge Kopf).

266. *Id.* (Nov. 5, 2013, 12:59 PM comment by Judge Kopf).

erous coverage my draft article received in the *Wall Street Journal* blog and academic blogs.<sup>267</sup>

The reaction to Judge Scheindlin's removal was decidedly negative and overwhelmingly supported her right to speak publicly about the judicial process.<sup>268</sup> Moreover, Judge Scheindlin herself, represented by New York University Professor Burt Neuborne, sought leave to file a motion regarding her disqualification in front of the Second Circuit.<sup>269</sup> The City then sought modification of the Second Circuit's order staying Judge Scheindlin's *Floyd* and *Ligon* opinions (stayed in the same order that removed the judge), asking that the court instead vacate her orders in service of the "appearance[] of fair and impartial administration of justice."<sup>270</sup> The Second Circuit denied both requests. First, it found that it knew of "no precedent suggesting that a district judge has standing before an appellate court to protest reassignment of a case."<sup>271</sup> Second, it denied the City's motion to vacate, albeit without prejudice.<sup>272</sup>

Bill de Blasio won the New York City mayoral election on November 23, 2013. During his campaign, de Blasio had promised to withdraw the City's appeals of the *Floyd* and *Ligon* matters.<sup>273</sup> This caused speculation that de Blasio's win essentially ended the *Floyd* and *Ligon* appeals and that Judge Scheindlin's orders would stand.<sup>274</sup> In addition, the group com-

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267. See Andrew M. Ironside, *The Danger of Nonrandom Case Assignment: How the Southern District of New York's 'Related Cases' Rule has Shaped the Evolution of Stop-and-Frisk Law*, C.R. L. & POL'Y BLOG (Dec. 1, 2013), [http://lawprofessors.typepad.com/civil\\_rights/2013/11/the-danger-of-nonrandom-case-assignment-how-the-southern-district-of-new-yorks-related-cases-rule-ha.html](http://lawprofessors.typepad.com/civil_rights/2013/11/the-danger-of-nonrandom-case-assignment-how-the-southern-district-of-new-yorks-related-cases-rule-ha.html); Joe Palazzolo, *The Problem With Not-So-Random Case Assignment*, WALL ST. J. L. BLOG (Nov. 4, 2013), <http://blogs.wsj.com/law/2013/11/04/the-problem-with-not-so-random-case-assignment/>; John Steele, *Recap and Links to Key Documents in the Judge Scheindlin Matter*, LEGAL ETHICS FORUM (Nov. 11, 2013), <http://www.legalethicsforum.com/blog/2013/11/recap-and-links-to-key-documents-in-the-judge-scheindlin-matter.html>.

268. See, e.g., Emily Bazelon, *Shut Up, Judge! A Misguided Appeals Court Tries to Silence—and Quash—Stop-and-Frisk Judge Shira Scheindlin*, SLATE (Nov. 1, 2013), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/11/nypd\\_and\\_judge\\_shira\\_scheindlin\\_2nd\\_circuit\\_appeals\\_court\\_judges\\_try\\_to.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/nypd_and_judge_shira_scheindlin_2nd_circuit_appeals_court_judges_try_to.html); Editorial Board, *Judge Scheindlin's Case*, N.Y. TIMES (Nov. 7, 2013), <http://www.nytimes.com/2013/11/08/opinion/judge-scheindlinscase.html?hpw&rref=Opinion>; Jeffrey Toobin, *The Preposterous Removal of Judge Scheindlin*, NEW YORKER (Oct. 31, 2013), <http://www.newyorker.com/online/blogs/newsdesk/2013/10/the-preposterous-removal-of-judge-scheindlin.html>.

269. Notice of Appearance as Amicus Counsel on Behalf of Movant Shira A. Scheindlin, *Ligon v. City of New York*, No. 13-3123 (2d Cir. Nov. 6, 2013).

270. Motion to Modify the Stay Order on Behalf of Appellant City of New York at 2, *Floyd v. City of New York*, No. 13-3088 (2d Cir. Nov. 9, 2013).

271. Motion Order Denying Motion for Leave to Appear on Behalf of Movant Shira A. Scheindlin at 6, *Floyd v. City of New York*, No. 13-3088 (2d Cir. Nov. 13, 2013).

272. Motion to Modify Stay Order on Behalf of Appellant City of New York at 2, *Floyd v. City of New York*, No. 13-3524 (2d Cir. Nov. 9, 2013).

273. Benjamin Weiser, *Judges Decline to Reverse Stop-and-Frisk Ruling, All but Ending Mayor's Fight*, N.Y. TIMES, Nov. 22, 2013, at A21.

274. See *id.*

prised of various NYPD unions (“the Police Intervenors”), has moved to intervene as appellants in *Floyd* and *Ligon*. The Police Intervenors argue that if the City withdraws its appeals, they should be permitted to “vindicate their own rights” and ensure that “the district court’s flawed injunction . . . will not saddle the NYPD and its members for years to come.” If the Police Intervenors are allowed into the *Floyd* and *Ligon* appeals, they may be able to raise substantive arguments to Judge Scheindlin’s orders and keep the appeals going.<sup>275</sup>

Though its opening briefs in *Floyd* and *Ligon* were not due until January, the City filed them in December,<sup>276</sup> before de Blasio took office.<sup>277</sup>

This story took another strange turn on December 23, 2013, when the Southern District of New York amended its related cases rule.<sup>278</sup> On the same date, Southern District of New York Chief Judge Preska was interviewed by the *New York Times* and noted that the changes were intended to “maximize the randomness of the assignment of cases – we wanted to regularize the process.”<sup>279</sup> Chief Judge Preska also noted “we wanted to increase transparency” and that “randomness is so important . . .

275. See, e.g., Michael C. Dorf, *What Are the Remaining Stakes in the NYC Stop-and-Frisk Litigation?*, DORF ON LAW, (Nov. 11, 2013), <http://www.dorfonlaw.org/2013/11/what-are-remaining-stakes-in-nyc-stop.html>.

276. See Brief on Behalf of Appellant City of New York at 13, *Floyd v. City of New York*, No. 13-3524 (2d Cir. Sept. 13, 2013); Brief on Behalf of Appellant Joseph Bermudez et al, *Ligon v. City of New York*, No. 13-03442 (2d Cir. Sept. 13, 2013).

277. On January 30, 2014, de Blasio announced that New York City would settle the *Floyd* and *Ligon* cases. See Benjamin Weiser & Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. TIMES, Jan. 30, 2013, <http://www.nytimes.com/2014/01/31/nyregion/de-blasio-stop-and-frisk.html>. However, on the same date that announcement was made, the City also moved to remand the cases back to the Southern District of New York. See *Floyd and Ligon Plaintiffs’ Joint Reply In Support Of Appellant City of New York’s Motion For A Limited Remand* at 4, *Floyd v. City of New York*, No. 13-3088 (2d Cir. Feb. 14, 2014), available at <http://ccrjustice.org/files/Floyd%20%26%20Ligon%20Joint%20Reply%20in%20Support%20of%20Remand.pdf>. The Second Circuit’s Feb. 21, 2014 order is available here: <http://ccrjustice.org/files/21%20Feb%202014%20COA%20Decision%20on%20remand.pdf>. The plaintiffs claimed, despite de Blasio’s prior announcement, that “the parties have not reached a ‘settlement agreement,’” only an agreement “to proceed towards resolving this litigation by negotiating the terms of the independent monitor.” *Id.* On February 21, 2014, the Second Circuit granted the motion to remand, staying all appeals, “to the extent necessary to pursue settlement negotiations among such concerned or interested parties as the District Court deems appropriate.” Case No. 13-3461, Dock. No. 285-1 at 3 (2d Cir. Feb. 21, 2014). The court was careful to note that the intervenors’ motions have yet to be resolved, but stated that it was preferable “that the motions be addressed [in the district court] in the first instance, particularly because the appropriateness of intervention and the form it takes could well bear on settlement negotiations.” *Id.* at 8–9. As a result, the cases remain unresolved.

278. See Order In Re: Rule 13 of The Rules for the Division of Business Among Judges at n.1, No. 13-MISC-00432 (S.D.N.Y. Dec. 23, 2013).

279. Benjamin Weiser & Joseph Goldstein, *Federal Court Alters Rules on Judge Assignments*, N.Y. TIMES, Dec. 23, 2013, <http://www.nytimes.com/2013/12/24/nyregion/federal-court-alters-rules-on-judge-assignments.html>.

to try to avoid judge-shopping.”<sup>280</sup> Finally, she noted that “[d]evelopment of the law is better served by having different judges’ thinking about the issue.”<sup>281</sup>

The changes are good ones. Now, “the court’s three-judge assignment committee, including the chief judge, will review every case where a claim of relatedness has been made.”<sup>282</sup> Importantly, the new rule provides that “[c]ivil cases shall not be deemed related merely because they involve common legal issues or the same parties.”<sup>283</sup> Gone is the provision leaving the relatedness decision to the sole discretion of the judge in the earlier-filed case, which permitted a case to be deemed “related” without any finding of actual factual or legal relatedness.

However, assignment by lot is still easily overcome in the Southern District of New York despite these recent changes. For example, senior and visiting judges may still select the type of cases they accept and reject. Patent cases are still being assigned to self-selected judges. And most importantly, no change was made to Division of Business Rule 14, which still permits “[a]ny judge, upon written advice to the assignment committee” to “transfer directly any case or any part of any case on that judge’s docket to any consenting judge.”<sup>284</sup>

This rule endorses the sort of subject matter-based case assignment that happened in the stop-and-frisk cases and may permit similar manipulation in the future. To effect meaningful changes to its case assignment procedures, the Southern District of New York should consider undertaking a review of all rules that inject judges into the case-assignment process. Moreover, time for public comment, even public hearings, on any proposed changes would allow litigants and counsel previously impacted by nonrandom assignment to be heard. There is great public interest in this issue, and the judiciary might benefit from seeking public feedback. There must be some sort of balance struck between efficiency, which may at times justify nonrandom assignment, and rules like Rule 14 that allow for case assignment manipulation and judicial case-shopping.

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280. *Id.*

281. *Id.* These reasons mirror the arguments made in my August 22, 2013 note, nearly verbatim. See Macfarlane, *supra* note 238, at 5 (explaining that random case assignment “prevents any party from shopping for one judge over another”); *id.* at Abstract (“[D]istrict courts retain discretion to assign cases as they wish, with little (if any) obligation for transparency.”); *id.* at 39 (“[A]llowing one judge to collect a stream of factually distinct cases in [one] . . . area of the law elevates that judge over other judges in her district” and “no other judge has the opportunity to hear landmark stop-and-frisk cases.”); *id.* at 39–40 (“[O]nce . . . the NYPD’s stop-and-frisk procedures reaches the appellate level of review, [they] will only have been vetted by one jurist. A difference in opinion may have guided the Second Circuit’s . . . analysis of a complicated area of the law.”).

282. Weiser & Goldstein, *supra* note 279.

283. Order, *supra* note 278, at 2 (“Limitations on General Rule”).

284. See Division of Business Rules, *supra* note 5, Rule 14.